Petition

81-795

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

J. S. ALBERICI CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

CLYDE L. SISCO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals Err in Holding That 42 U.S.C. §1981 Affords an Independent Cause of Action for "Retaliation" Without Stating Whether the Provisions of 42 U.S.C. §2000e-3 are Engrafted onto §1981 or Without Defining Standards for a Cause of Action for Retaliaton Under §1981?

II. Did The Court Of Appeals Err In Holding That Respondent Is Entitled To A Jury Trial In His Action for Retaliation Pursuant To 42 U.S.C. § 1981?

III. Did the Court of Appeals Err in Holding That There is a Cause of Action Based Upon 42 U.S.C. §1981 for Retaliation so as to Render an Employer Liable for any Relief, Legal or Equitable, to an Employee Protesting the Employer's Lawful Conduct Under a Specifically Sanctioned "Job-Action Plan," Which is Thereafter Judicially Determined to be Lawful Conduct by the Employer?

IV. Did the Court of Appeals Err in Holding That an Employee Has a Cause of Action for Retaliation Based Upon 42 U.S.C. §1981 Pursuant to the "Opposition Clause" Found in 42 U.S.C. §2000e-3 Where the Employee Made a Self-Serving, Subjective "Good Faith Determination" of "a Practice Made Unlawful" So As To Give the Employee's Determination the Force of Law Upon Which to Predicate a Cause of Action in the Face of a Later Judicial Determination of Lawful Conduct of the Employer?

V. Did The Court Of Appeals Err In Holding That Respondent Is Entitled To A Jury Trial In His Action for Retaliation Pursuant To 42 U.S.C. §1981 In View Of This Court's Opinion In *Parklane Hosiery* v. *Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed2d 552 (1979)?

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CITATIONS TO OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals which contains the decision relating to the issues here involved is reported at 655 F.2d 146 (8th Cir. 1981). A copy of that Opinion is printed in Appendix A hereto, *infra,* pages A-1 through A-9. The judgment and opinion of the District Court after trial is not reported but is printed in Appendix B hereto, *infra,* pages A-10 through A-27. Because of its importance to the issues presented here the original Opinion of the Eighth Circuit Court of Appeals in *Setser* v. *Novack Investment Company,* 638 F.2d 1137 (8th Cir. 1981) is printed in Appendix C hereto *infra,* pages A-28 through A-46. Also, because of its importance to these issues, the Opinion of the Eighth Circuit Court of Appeals En

Banc, upon rehearing, in *Setser* v. *Novack Investment Co.*, not yet reported, is printed in Appendix D, *infra,* pages A-47 through A-59.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit, by a three judge panel, rendered its Opinion herein on July 29, 1981. Such Opinion contains the issues which Petitioners seek to review herein. Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

42 U.S.C. § 1981 provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 704(a) Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e-3(a) provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Respondent, Clyde L. Sisco (Sisco), is a white male iron worker and his complaint was based upon alleged violations of 42 U.S.C. § 1981 and § 2000(e) et seq. It was the allegation of Sisco that he was the victim of reverse discrimination on the basis that he was discharged (laid off) from employment by the petitioner J. S. Alberici Construction Company, Inc. (Alberici) because of his race. Sisco claims that he was further damaged pursuant to 42 U.S.C. § 1981 when Alberici allegedly retaliated against him because of his opposition to Alberici's application of the "St. Louis Plan" in the reduction of its work force.

The district court, prior to trial, struck *sua sponte* the demand of Sisco for jury trial.

The case was tried without a jury. Sisco sought monetary damages for reinstatement, back pay, lost insurance benefits, pain and suffering, punitive damages, interest, attorneys' fees and costs. On April 24, 1980 the district court rendered its opinion and judgment in favor of Alberici. Respondent appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit Court of Appeals reversed and remanded the case to the district court, holding that Sisco was entitled to a jury trial, that 42 U.S.C. § 1981 supports a claim for retaliation pursuant to its decision in *Setser* v. *Novack Investment Company,* 638 F.2d 1137 (1981) (*Setser* I) (655 F.2d at 148) and that the issue of retaliation pursuant to 42 U.S.C. § 1981 should be tried to a jury pursuant to the decision in *Setser* v. *Novack Investment Co.* (en banc, July 21, 1981) (Setser II) (655 F.2d at 149).

JURISDICTION OF FEDERAL COURT

This action is for alleged violations of 42 U.S.C. § 1981 and § 2000(e) et seq. The jurisdiction of the courts below was pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5(f).

REASONS FOR GRANTING WRIT

I.

The Court Of Appeals Erred In Holding That 42 U.S.C. §1981 Affords An Independent Cause Of Action For "Retaliation" Without Stating Whether The Provisions Of 42 U.S.C. §2000e-3 Are Engrafted Onto §1981 Or Without Defining Standards For A Cause Of Action For Retaliation Under §1981.

In this case the Eighth Circuit relied upon its prior decision in *Setser* v. *Novack Investment Co.*, 638 F.2d, 1137, 1146 (1981) (*Setser I*) which holds that 42 U.S.C. §1981 forbids "a retaliatory response by an employer against...an applicant who genuinely believed in the merits of his or her complaint..." (A. 7, 655 F.2d at 150).

Initially, Petitioner would note that the decision of the Eighth Circuit conflicts with the decision of the Second Circuit in *Hudson* v. *International Business Machines Corp.*, 620 F.2d 341 (2nd Cir. 1980), cert. denied ____ U.S. ____, 101 S.Ct. 794, 66 L.Ed.2d 611 (1980). The precise issue of whether or not a cause of action for retaliation may be found within 42 U.S.C. § 1981 as was held here, as well as in *Setser I*, conflicts with *Hudson* v. *International Business Machines Corp.*, 620 F.2d 351 (2nd Cir. 1980). There the plaintiff filed a petition for writ of certiorari to this Court and raised as an issue in his petition:

> "Did the Court of Appeals incorrectly hold that Petitioner could not maintain a retaliation action under the 1866 Civil Rights Act?" (22 EPD ¶ 30,838, Dkt. No. 80-530).

This Court denied the petition for writ of certiorari in *Hudson* v. *International Business Machines Corp.*, 66 L.Ed. 2d 611 (1980).

Petitioner would also respectfully submit that the Eighth Circuit holding that a cause of action for retaliation exists should

be reviewed due to the failure of the Eighth Circuit to determine in any fashion whether the provisions of subparagraph (a) of 42 U.S.C. §2000e-3 are engrafted onto the provisions of §1981 and if there is no such engrafting, then what standards define a cause of action for retaliation under §1981. Point III of *Setser I* (638 F.2d at 1146-1147) provides no guidance in that Judge Hunter merely holds that "§1981 creates substantive rights of its own that are redressable quite apart from Title VII." While Judge Hunter may have been able to make a quantum leap in logic that a cause of action exists for retaliation under §1981, Alberici respectfully submits that without more than a bare bones assertion that such a cause of action exists, the holding of the Eighth Circuit should be examined. As this Court noted in *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975):

> "The queston of whether § 704(a) [§2000e-3] is applicable to the facts of this case is not as free from doubt as the respondent and *amicus* would have it. In its brief the NLRB argues that § 704(a) is directed at protecting access to the EEOC and federal courts. *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998 (CA5 1969). We have previously had occasion to note that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973). Whether the protection afforded by § 704(a) extends only to the right of access or well beyond it, however, is not a question properly presented by these cases. Nor is it an appropriate question to be answered in the first instance by the NLRB. Questions arising under Title VII must be resolved by the means that Congress provided for that purpose.
>
> In the course of arguing for affirmance of the decision below, under which the NLRB would be called upon to

evaluate the effectiveness of a union's efforts to oppose employer discrimination in the bargaining unit, respondent takes the position that the Board is well equipped by reason of experience and perspective to play a major role in the process of eliminating discrimination in employment. The Board-enforced duty of fair representation, it is noted, has already exposed it to the problems that inhere in detecting and deterring racial discrimination within unions. What is said above does not call into question either the capacity or the propriety of the Board's sensitivity to questions of discrimination. It pertains, rather, to the proper allocation of a particular function—adjudication of claimed violations of Title VII—that Congress has assigned elsewhere. 420 U.S. at 72, n. 25."

The holding of the Eighth Circuit Court of Appeals that the cause of action based upon retaliation exists under 42 U.S.C. § 1981 is supported neither by case authority nor the record.

II.

The Court Of Appeals Erred In Holding That Respondent Is Entitled To A Jury Trial In His Action For Retaliation Pursuant To 42 U.S.C. § 1981.

The Eighth Circuit based its holding that a jury trial is available under 42 U.S.C. § 1981 upon the earlier panel opinion of *Setser I*, 638 F.2d 1137 (8th Cir. 1981). The holding of *Setser I* directly conflicts with *Lynch* v. *Pan American World Airways*, 475 F.2d 764 (5th Cir. 1973) which specifically held that a plaintiff is not entitled to a jury trial under 42 U.S.C. § 1981.

The Eighth Circuit opinion will also create a dichotomy with regard to the Seventh Amendment right to a jury trial where a cause of action alleges both §1981 and Title VII theories of recovery as in this case (655 F.2d at 150-151). Under this Court's decision in *Lehman* v. *Nakshian*, ____ U.S. ____, 101 S.Ct. 2698, 68 L.Ed.2d ____ (1981) Title VII cases are not triable as of

right to a jury. This was recognized by Judge Arnold in the Eighth Circuit opinion. 655 F.2d at 151 The result of this dichotomy will be to produce situations where a plaintiff may choose a jury trial depending upon his choice of the statute upon which he bases his cause of action. This would occur even though his lawsuit complains of only *one* course of conduct engaged in by an employer.

The clear conflict between the holding of the Eighth Circuit in *Setser I* and the holding of the Fifth Circuit in *Lynch* v. *Pan American World Airways* together with the dichotomy arising from this Court's decision in *Lehman* v. *Nakshian* requires that this petition for writ of certiorari be granted.

III.

The Court Of Appeals Erred In Holding That There Is A Cause Of Action Based Upon 42 U.S.C. §1981 For Retaliation So As To Render An Employer Liable For Any Relief, Legal Or Equitable, To An Employee Protesting The Employer's Lawful Conduct Under A Specifically Sanctioned "Job-Action Plan", Which Is Thereafter Judicially Determined To Be Lawful Conduct By The Employer.

The district court found that the action of Alberici in transferring Sisco pursuant to the "St. Louis Plan" implemented under parts 2 and 3 of Executive Order No. 11246 was proper. The district was affirmed in this regard by the Eighth Circuit. Such "job action plans" were specifically sanctioned by this Court in *United Steel Workers* v. *Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed 2d 480 (1979). The Eighth Circuit nevertheless found that Sisco was entitled to trial on his theory of retaliation where the employer's conduct was lawful. This is despite the fact that the actions of Petitioner under the "St. Louis Plan" have been granted the imprimatur of this Court in *Weber.*

This holding raises an anomaly such has not been presented to this Court since its holding in *Weber* as well as *Regents of University of California* v. *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). The situation presented to this Court is one where an employer acting pursuant to a proper social mandate to extinguish all vestiges of race discrimination within its employment practices will now face liability from an employee who attempts to perpetuate such past racial discrimination under the subjective standard of the employee's own "good faith belief".

Under the opinion of the Eighth Circuit the following disapproved argument of the respondent in *Weber* will come to pass. The Respondent there argued:

> "Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument rests upon a literal interpretation of §§ 703(a) and (d) of the Act. Those sections make it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs. Since, the argument runs, *McDonald* v. *Sante Fe Trail Trans. Co., supra,* settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.
>
> Respondent's argument is not without force. But it overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context respondent's reliance upon a literal construction of § 703(a) and (d) and upon *McDonald* is misplaced. See *McDonald* v. *Sante Fe Trail Trans. Co., supra,* at 281 n. 8, 96 S.Ct., at 2579. It is a "familiar rule that a thing may be within the letter of the

> statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Hold Trinity Church* v. *United States,* 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)." 443 US at 196, 99 S.Ct. at 2726-2727.

If *Weber* is to be implemented to its fullest extent, as this Court surely intended it to be, then this decision of the Eighth Circuit should be reviewed.

The opinion of the Court of Appeals is in direct conflict with the holding of *United Steelworkers* v. *Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) and therefore justifies the granting of the petition.

IV.

The Court Of Appeals Erred In Holding That An Employee Has A Cause Of Action For Retaliation Based Upon 42 U.S.C. §1981 Pursuant To The "Opposition Clause" Found In 42 U.S.C. §2000e-3 Where The Employee Made A Self-Serving, Subjective "Good Faith Determination" Of "A Practice Made Unlawful" So As To Give The Employee's Determination The Force Of Law Upon Which To Predicate A Cause Of Action In The Face Of A Later Judicial Determination Of Lawful Conduct Of The Employer.

The holding of the Eighth Circuit in this case as well as in *Setser I* is based upon inapposite authority. *Setser I* relies upon *Winston* v. *Lear-Siegler, Inc.,* 588 F.2d 1266 (6th Cir. 1977) in holding that a cause of action exists for a retaliatory response by an employer against an applicant who "genuinely believes in the merits of [a] complaint..." (638 F.2d at 1146). Significant by its absence from *Winston* v. *Lear-Siegler* is any statement remotely touching upon the issue of the good faith belief of an employee who complains of discrimination. Thus, the holding of the Court in *Setser I,* relied upon by this decision, is based upon suspect authority.

The holding of the Eighth Circuit in the instant case is also based upon inapposite case authority. The Court relies upon *Berg* v. *La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980); and *Sias* v. *City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978). These decisions can be distinguished from the instant case. In both cases the employee voiced opposition on behalf of a fellow employee with regard to conduct by the employer which was illegal discrimination. In *Berg* the conduct complained of was discrimination against pregnant women for disability benefits (612 F.2d at 1041-1043), and in *Sias* the issue was discrimination in promotion of Mexican-Americans (588 F.2d at 694). Equally misplaced is the Eighth Circuit's reliance upon *Hearth* v. *Metropolitan Transit Commission*, 436 F.Supp. 685 (D. Minn. 1977) in view of the factual record of this case. In this case unlike *Hearth*, there was no good faith belief in opposition to conduct directed against a fellow employee. 436 F. Supp. at 688-689. The record here is to the contrary; Sisco attempted to secure his job at the expense of a black fellow worker with more job seniority (A. 6, 655 F.2d at 149). Compare *Monteiro* v. *Poole Silver Co.*, 615 F.2d 4, 7 (1st Cir. 1980).

The suspect authority upon which the Eighth Circuit based its opinion justifies granting this petition.

V.

The Court Of Appeals Erred In Holding That Respondent Is Entitled To A Jury Trial In His Action For Retaliation Pursuant To 42 U.S.C. § 1981 In View Of This Court's Opinion In *Parklane Hosiery* v. *Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed2d 552 (1979).

In its holding that Sisco is entitled to a jury trial on the issue of the alleged retaliatory conduct against him the Eighth Circuit, again relying upon *Setser I*, states that such a jury trial is required because:

> "...Under well established doctrine, an issue of fact common to a legal and equitable claim must be tried to a jury, less Seventh Amendment rights be extinguished by collateral estoppel if the equitable claim is tried first to the court. *See Setser I,* 638 F.2d at 1141 & n.8." 655 F.2d at 151.

This holding directly conflicts with the holding of *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) where a court trial which determined equitable issues was held to collaterally estop defendants from a trial by jury on later legal issues. 439 U.S. at 334-335, 99 S.Ct. at 653.

As discussed in Point III above the holding of the Eighth Circuit in the instant case creates an anomalous result. The opinion holds that Alberici's conduct in implementing the "St. Louis Plan" was proper and legal, yet it also allows Alberici to be subjected to possible significant financial liability by reason of its reliance upon the plan and its attempt to exterminate race discrimination. This liability can attach even though the plan has been held under equitable principles to have been proper conduct (655 F.2d at 146).

This Court's decision in *Parklane* clearly sought to advance judicial economy by precluding numerous, lengthy jury trials. 439 U.S. at 326-327, 99 S.Ct. at 645.

Despite the holding of *Parklane,* which was even more onerous than the present situation, since there the defendants had a monetary judgment entered against them because of an adverse result in an earlier bench trial, this opinion of the Eighth Circuit will allow a defendant to be subjected to a jury trial even though there has been a prior judicial determination that the conduct of the employer opposed by the employee was proper.

Unless this opinion of the Eighth Circuit is examined, the rule of law enunciated in *Parklane* will be abrogated with regard to any person who files a § 1981 claim for retaliation in the context of an approved affirmative action plan.

It would appear that rather than adhering to the rule of law set forth in *Parklane,* the Eighth Circuit has decided to adopt in both *Setser I and II,* and this case, the dissenting opinion of Justice Rehnquist in *Parklane* as its view of the law. 439 U.S. at 337, 99 S.Ct. at 655.

If affirmative action plans such as are involved here are to have any meaning in view of this Court's decision in *Parklane,* this petition for writ of certiorari should be granted.

CONCLUSION

The need to focus the wisdom of this Court upon this case is manifest.

The instant petition presents clear issues that demand to be determined in view of the present burgeoning case load of the Federal courts. Courts are not insensitive to the environment out of which the litigation flows. Perhaps never before in American history have so many employers been faced with legal and moral dilemmas arising from employment practices, accepted in the past, but now universally condemned. To affirmatively correct these past wrongs, businesses adopted a course of conduct for which the opinion of the Eighth Circuit would now impose liability.The opinion here threatens and undermines the continued use of this constructive conduct in remedying past wrongs. At a time when the last vestiges of race-based discrimination, as recognized by this Court in *Weber,* are being eliminated, American business should be entitled to clear guidance as to its potential liability in attempting to wipe out such discrimination.

The eyes of American business may well be fixed upon the decision of this Court in determining how the social mandates found in the Civil War Civil Rights Acts as well as the Civil Rights Act of 1964 are to be implemented. The opinion of the Court of Appeals of the Eighth Circuit must be reviewed or it

could well sound the death knell of the constructive remedial process of affirmative action plans. An employer properly applying a valid affirmative action plan must be protected from employees protesting the enforcement of the plan. To allow the employee to cloak his conduct with protection not afforded by the statute (§ 1981) is error. To allow the employee to cloak his conduct with protection by a self-serving "good faith belief" is anarchy and impossible to administer. The necessity of guidance in this particularly important area in the implementation of the congressional mandate of eradication of racial discrimination must be considered.

The law, the record and the interests of justice dictate that the petition of J.S. Alberici Construction Company, Inc. for writ of certiorari must be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1420

Clyde L. Sisco,
Appellant,

v.

J.S. Alberici Construction Company, Inc.
Appellee.

On Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 15, 1981

Filed: July 29, 1981

Before HEANEY, Circuit Judge, GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

Clyde L. Sisco appeals from the judgment of the District Court[1] dismissing his claim for damages for unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and under 42 U.S.C. §1981. He seeks relief against the J.S. Alberici Company, alleging that he was discharged from

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[1] The Honorable James H. Meredith, Senior United States District Judge for the Eastern District of Missouri.

employment because of his race. Sisco also claims that the District Court wrongly denied his request for a jury trial. We affirm in part and reverse in part.

I. THE FACTS

Alberici, which engages in the construction business nationally and in the St. Louis, Missouri, area, was awarded a contract by the federal government to perform work on the United States Post Office Fixed Mechanization Project at St. Louis. The contract was subject to an affirmative-action plan promulgated pursuant to Parts II and III of Exec. Order No. 11246, 42 U.S.C. §2000e note, and entitled the "St. Louis Plan." The Plan was designed to correct a "pattern of recruitment, hiring, training, referral, and access to union membership that had resulted in the exclusion of minority group persons from . . . meaningful representation in the construction industry." 41 C.F.R. §60-7.10 (1974). The Plan provided, among other things, that certain goals were to be met on the basis of minority personnel working in each specified trade on each of a given contractor's projects, whether federally funded or otherwise, within the City and County of St. Louis during the term of the covered contract. Goals were established for the number of minority hours of employment calculated as a percentage of total hours of employment. For the period ending December 31, 1974, the goal for ironworkers was 7.6 to 9%. For calendar year 1975, the goal was increased to a level of from 9 to 10.4%.

Alberici was required to complete and submit reports to the United States Department of Labor on the percentage of minority employment. The first report on the Post Office project had a beginning date of October 23, 1973. No black ironworker was employed on this project until January 22, 1974. For the reporting period of October 30, 1974, through November 26, 1974, minority "man-hours" amounted to 24% of total man-hours. During that time, there was one minority employee out

of a total of four ironworkers. For the December, 1974, reporting period, only 4% of the man-hours were worked by minority employees. Thereafter, the minority percentage rose back up to acceptable levels, in part because of Sisco's transfer, the circumstances of which we will not describe.

Clyde Sisco, a white male, was employed as an ironworker on the Post Office project. He also held the position of union steward. During the course of work on the project, Alberici determined that it did not need four ironworkers, but that in order to maintain compliance with the St. Louis Plan, a cutback in its force required the maintenance of at least one minority ironworker on the site. Consequently, Sisco and another white ironworker were laid off, while the only black ironworker and the crew foreman, a white male, were retained. Sisco protested this action and informed Alberici that, under the Ironworkers Collective Bargaining Agreement, Sisco, as union steward, was entitled to special treatment. Under the Agreement, the steward is supposed to be "the last man laid off."

Because Sisco "refused to cooperate," a meeting subsequently was held and attended by John C. Bartnett, then the Equal Employment Opportunity (EEO) officer for Alberici, representatives of the union, and Sisco. The parties agreed that the Agreement gave Alberici the right to close down completely the work at the Post Office project site and transfer all ironworkers, including Sisco, to other jobs. After that, Alberici could reopen the project site and assign workers there in compliance with both the Agreement and the St. Louis Plan.

Sisco, along with other workers, was transferred to Alberici's fabrication shop. He and several workers were later transferred to the Chevrolet plant run by Alberici. On December 6, 1974, that plant closed for a period of time, and Sisco was laid off. Shortly thereafter, Sisco went to work for several other construction companies. Although he did not file a grievance with his union, Sisco did file a complaint with the Equal Employ-

ment Opportunity Commission (EEOC) on March 14, 1975.[2] He was issued a notice of right to sue from the EEOC on June 1, 1977, and this action was brought on July 27, 1977.

Sisco's appeal raises the following issues: (1) whether reliance on the St. Louis Plan by the J.S. Alberici Company is an affirmative defense as a matter of law to Sisco's claim of unlawful discrimination; (2) whether Sisco has a cognizable claim for retaliation under 42 U.S.C. §2000e-3(a) and 42 U.S.C. §1981; and (3) whether the District Court erred by denying his request for a jury trial.

After the oral argument in this case, another panel of this Court decided *Setser* v. *Novack Inc. Co.*, 638 F.2d 1137 (8th Cir. 1981). For convenience, we will refer to this panel opinion as *Setser I.* There, the Court held (1) that §1981 actions are triable as of right to a jury, *id.* at 1139-43, and (2) that "a §1981 cause of action . . . encompasses . . . allegations of retaliatory conduct . . .." *Id.* at 1147. In addition, Part II of the opinion in *Setser I* discusses the circumstances in which an affirmative-action plan is a defense to a claim of reverse discrimination. This part of the opinion was, in legal effect, withdrawn when this Court ordered the case, insofar as Part II of the panel opinion was concerned, reheard en banc. Rehearing en banc was not ordered with respect to Part I (jury trial) and II (retaliation) of the panel opinion. After the rehearing, this Court filed a new opinion, *Setser* v. *Novack Inv. Co.*, No. 80-1100 (8th Cir. July 21, 1981) (en banc), which we shall call *Setser II.* In the en banc opinion, the Court lays out the law on the subject of affirmative-action plans as a defense. In brief, an employer who in good faith applies an affirmative-action plan to remedy past discrimination is not in violation of either Title VII or Section

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[2] The EEOC determined that there was reasonable cause to believe that Alberici had discriminated against Sisco because of his race and had retaliated against him because he opposed conduct unlawful under 42 U.S.C. §2000e.

1981, so long as the plan lasts no longer than necessary "to eliminate a manifest racial imbalance," "does not unnecessarily trammel the interests of the white employees," "does not require the discharge of white workers and their replacement with new black hirees," and does not "create an absolute bar to the advancement of white employees . . .." *United Steelworkers* v. *Weber,* 443 U.S. 193, 208 (1979). Thus, the law in this Circuit is now clear on each of the three questions presented by Sisco's appeal. The jury-trial and retaliation issues are settled by the panel opinion in *Setser I,* and the use of the affirmative-action plan as a defense is governed by the opinion of the Court en banc in *Setser II.* We are of course bound by these holdings. We now proceed to apply them to the case before us.

II. THE LEGAL QUESTIONS

A. Trial by Jury

The jury-trial question is concluded in this Circuit by *Setser I.* The District Court (acting before *Setser I* was decided) struck plaintiff's demand for trial by jury. Since plaintiff here pleaded not only a disparate-treatment claim under Title VII, but also a §1981 claim, he was entitled to trial by jury under the Seventh Amendment.

B. The Affirmative Action Plan

It does not automatically follow, however that the judgment must be reversed, and the cause remanded for a complete new trial before a jury. It remains our duty to inspect the record and determine if defendant would in any event be entitled to judgment as a matter of law. Compare *Setser I,* 638 F.2d at 1142-43. Here, the District Court, in its findings of fact and conclusions of law entered after the bench trial, squarely held, relying, *inter alia,* on *Weber,* that "defendant's actions pursuant to the St. Louis Plan are permissible under the circumstances in this case." *Clyde L. Sisco* v. *J.S. Alberici Constr. Co.,* No.

77-0810-C (c), slip op. at 14 (E.D. Mo., April 24, 1980). This holding is fully consistent with the standards recently laid down in *Setser II,* and the validity of the affirmative-action plan itself is, as *Setser II* explains, a question of law to be decided by the court, not the jury.

Here the employer adopted the affirmative-action plan because it had to do business with the United States. It was under pressure from government officials to improve its percentage of minority hours worked. There was a history of exclusion of black workers from the ironworkers' trade in St. Louis. Alberici had decided, for reasons wholly unrelated to race or to Sisco personally, to reduce its force of ironworkers at the Post Office from four to two. In order to accomplish that goal without further worsening its ratio of minority hours, the black ironworker (who had been on the job site longer than Sisco and whose qualifications are not questioned) had to be retained. Of the two employees left, one was white. The St. Louis Plan was temporary, in the sense that its goals were expressed in terms of percentages of hours worked; once the percentages were met, no further action by the company was required. Sisco was not replaced by a new black worker. A qualified black employee with more seniority on the job site was simply retained in preference to Sisco and another white man. For these reasons, we hold that Alberici's initial decision to remove Sisco from the Post Office job was not unlawful.

C. Retaliation

Sisco also claims that his subsequent lay-off from the Chevrolet site, and the failure thereafter of Alberici ever to hire him again, was unlawful retaliation. This portion of the case must be remanded for trial to a jury. We have carefully reviewed the record, including the transcript of testimony and the exhibits, and we are unable to say that Sisco failed to make a submissible case on the question whether Alberici's conduct was

motivated by a desire to retaliate against Sisco because he objected to what he believed was racial dicrimination.

Sisco asserts a retaliation claim under both Title VII and 42 U.S.C. §1981. The relevant portion of Title VII, 42 U.S.C. §2000e-3, reads as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 1981 has no specific retaliation provision, but, as we have noted, *Setser I* holds that retaliation, in a racial discrimination context, can violate this provision.

The transfer of ironworkers from the Post Office project, which Sisco opposed, was not unlawful, as we have held above. We agree, however, with the District Court in *Hearth* v. *Metropolitan Transit Commission,* 436 F. Supp. 685, 688 (D. Minn. 1977), that "as long as the employee had a reasonable belief that what was being opposed constituted discrimination under Title VII, the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII." The Seventh and Ninth Circuits have cited with approval this holding in *Hearth.* See this holding in *Hearth.* See *Berg* v. *La Crosse Cooler Co.,* 612 F.2d 1041 (7th Cir. 1980); *Sias* v. *City Demonstration Agency,* 588 F.2d 692 (9th Cir. 1978). Compare *Setser I,* 638 F.2d at 1146, holding that Section 1981 forbids "a retaliatory response by an employer against . . . an applicant who genuinely believed in the merits of his or her complaint . . .."

Sisco objected that his removal from the Post Office site was unlawful racial discrimination. We cannot say that this belief was unreasonable or in bad faith, even though we today hold.

based largely on case law developed long after the events in issue, that the company's reduction in force was not unlawful. A person in Sisco's position could reasonably have believed, especially in 1974, that racial discrimination in violation of law had occurred[3]. There is also sufficient evidence in the record to make out a jury issue on the question of the employer's motivation. Sisco had worked for Alberici almost continuously for eight years before the post-office incident occurred. Alberici's Mr. Bartnett testified that he "wasn't tickled" with Sisco's resistance to the implementation of the affirmative - action plan. There is evidence that when Sisco was finally let go on December 6, 1974, there was still some work to be performed at the Chevrolet site. Sisco never re-applied to Alberici for a job, but his wife did call Ray Pieper, a vice-president of the company, for whom she had done secretarial work, and told him her husband needed a job. According to Mrs. Sisco, Pieper agreed to check into the matter and call her back, but he never did so. According to Raymond Swarts, Sr., the foreman on the St. Louis post-office project in 1974, Red Weaver, who supervised the work at the Chevrolet plant, said "he has to leave Sisco go, he had orders from the office." And in June or July of 1977, according to Swarts, Weaver said, in Sisco's presence, "My hands are tied. I cannot hire him." A jury could permissibly find on this evidence (though it certainly would not *have* to) that Alberici simply decided to get rid of Sisco and never hire him again because he had protested what be believed to be unlawful treatment. In short, if the case had been tried to a jury, as we hold it should have been, Alberici would not, on this record, have been entitled to a directed verdict on the issue of retaliation.

It follows that the case must be tried again, this time to a jury, but only on the issue of retaliation. Sisco advanced a retaliation theory not only under Section 1981, but also under Title VII. The Supreme Court had indicated that Title VII cases are not triable as of right to a jury. See *Lehman* v. *Nakshian*, 49 U.S.L.

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[3] Apparently the EEOC did believe it. See note 2 *supra*.

Week 4835, 4837 (U.S. June 26, 1981) (No. 80-242). The issue of whether Alberici's conduct in laying Sisco off from the Chevrolet job, and thereafter failing to rehire him, was attributable to a desire to retaliate against Sisco for his protest against being removed from the Post Office job, is an issue of fact common and crucial to the retaliation claim either under Section 1981 or under Title VII. Under well-established doctrine, an issue of fact common to a legal and an equitable claim must be tried to a jury, lest Seventh Amendment rights by extinguished by collateral estoppel if the equitable claim is tried first to the court. See *Setser I,* 638 F.2d at 1141 & n.8. The District Court may wish to submit the case to the jury on special interrogatories as to retaliatory intent and damages, but we leave the method of trial to its sound discretion. If on the new trial Sisco presses his prayer for reinstatement, and if the jury verdict on the issue of retaliation is in his favor, whether to award the equitable relief of reinstatement will be for the court to decide. Ordinarily reinstatement follows a finding of Title VII or Section 1981 liability in employment-discrimination cases, but there can be extraordinary circumstances that would make this remedy inequitable. We imply no view on the merits of this question.

The judgment, insofar as it dismissed Sisco's claim arising out of his removal from the post-office job becaue of the St. Louis Plan, is affirmed. As to the retaliation claim, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Each side is to bear its own costs on this appeal. Since it remains to be seen whether Sisco will prevail on any aspect of his case, attorneys' fees are not allowed at this time.

It is so ordered.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 77-0810-C (C)

Clyde L. Sisco,
Plaintiff,

v.

J.S. Alberici Construction Company, Inc.,
Defendant.

CONSOLIDATED WITH

Cause No. 77-0964-C (C)

Philip Person,
Plaintiff,

v.

J.S. Alberici Construction Company, Inc.,
Defendant.

JUDGMENT

Findings of Fact and Conclusions of Law dated this day are hereby incorporated in and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs' actions against defendant Alberici for damages are hereby denied.

IT IS FURTHER ORDERED that the motion for attorney's fees submitted by defendant Alberici as to plaintiff Person in the amount of $6,000 is denied.

These causes are dismissed with prejudice.

Dated this 24th day of April, 1980.

/s/ J. H. Meredith
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to the Court. The Court has been duly advised by testimony, exhibits, and briefs of the parties. The Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Defendant J.S. Alberici Construction Company, Inc. ("Alberici"), is a Missouri corporation engaged in the business of construction nationally and in the St. Louis area.

2. Plaintiff Clyde L. Sisco is white citizen of the United States who was qualified for employment as an ironworker.

3. Plaintiff Philip Person is a black citizen of the United States who was qualified for employment as a carpenter and who had also had some limited experience working as a millwright.

4. Prior to June, 1974, Alberici was awarded a contract from the United States for the United States Post Office Fixed Mechanization Project, located at the U. S. Post Office, St. Louis, Missouri.

5. Because the project invovled more than $500,000 and was funded by the federal government, the contract was awarded subject to the requirements of the "St. Louis Plan."

6. The St. Louis Plan was adopted after public hearings were held by the Department of Labor in St. Louis, Missouri, on October 31 and September 1, 1970, and was designed to correct a "pattern of recruitment, hiring, training, referral, and access to union membership that had resulted in the exclusion of minority group persons from . . . meaningful representation in the construction industry."

7. The Ironworkers and Carpenters Unions were among those which had underrepresentation of minorities, and to which plaintiffs Sisco and Person belonged, respectively. Only two percent of journeymen ironworkers were minorities and only six percent of the carpenters were minorities prior to 1970.

8. The St. Louis Plan provided *inter alia* that integration goals set up under the plan were to be met and assessed on the basis of minority personnel working in each specified trade on each of a given contractor's projects, whether federally funded or otherwise, within the City of St. Louis and St. Louis County, Missouri, during the term of the covered contract.

9. The St. Louis Plan established goals for minority employment, therefore, based on the number of minority hours of employment calculated as a percentage of total hours of employment.

10. The goals established for the ironworkers were 7.6 percent to 9 percent for calendar year 1974 and 9 percent to 10.4 percent for calendar year 1975. The goals established for the carpenters were 6.7 percent to 8.2 percent for calendar year 1974 and 8.2 to 8.9 percent for calendar year 1975.

11. With respect to the percentages of minority hours of employment reported by Alberici, the St. Louis Plan provides:

> "Each agency shall review contractor's and subcontractor's employment practices during the performance of the contract. If the contractor or subcontractor

meets its goals or if the contractor or subcontractor can demonstrate that it or the labor union has made every good faith effort to meet those goals, the contractor shall be presumed to be in compliance with Executive Order 11246 . . . and no formal sanctions or proceedings leading toward sanctions shall be instituted unless the agency otherwise determines that the contractor or subcontractor is not providing equal employment opportunities. . . ."

12. On November 9, 1973, the Ironworkers Union, Local 396, in response to charges of discriminatory practices, entered into a consent decree with the United States of America before this Court. This decree had as its goal increased minority participation in the ironworker craft and, among other things, provided that:

> "Contractors who are obligated to meet specific affirmative action general conditions and specifications or other affirmative action requirements as imposed by any governmental agency (federal, state or local) may request ironworkers from either Group I or II, specifying the race of the workers needed; in such instances, the unions shall refer the requested number of individuals by race if available, regardless of their position on the referral list."

13. Defendant Alberici maintained an official Equal Employment Opportunity ("EEO") policy and an affirmative action program during the relevant time period of these consolidated actions. Defendant hired John C. Bartnett as its EEO officer to investigate allegations or complaints of racial discrimination raised by any employee or officer of Alberici relating to work done on any of Alberici's work sites. Mr. Bartnett participated in the initial stages of the resolution of the labor disputes involved in these actions.

14. On the Post Office Project, Alberici employed ironworkers and carpenters who were, respectively, members of the International Association of Bridge, Structural, and Ornamen-

tal Ironworkers, Machinery Movers and Riggers, Local No. 396, AFL-CIO ("Local 396"), and the Carpenters District Council of St. Louis, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

Claims of Plaintiff Sisco Against Defendant

15. Clyde L. Sisco ("Sisco"), is a white male ironworker who is a member of Local 396, who commenced his employment with the defendant on the Post Office Project on or about September 19, 1974.

16. At all times relevant to this action, defendant Alberici, as a member of the Associated General Contractors of St. Louis, was a party to the 1972-1975 Collective Bargaining Agreement with Local 396.

17. In accordance with Section 7.20 of the 1972-1975 agreement, plaintiff Sisco was appointed as the union's steward on the Post Office Project. Section 7.20 provides in pertinent part:

> "The employer agrees that the steward will not be discharged until after proper notification has been given to the union, and further, when employees are laid off, the job steward will be the last man laid off provided he is capable of doing the work in question."

The Ironworkers Collective Bargaining Agreement further provides:

> "Section 1.02 Right to Hire: The employer reserves and shall have the right to accept or reject, to employ or not to employ, any persons furnished by the union or to discharge any employee who has been accepted but who subsequently proves unsatisfactory to the employer.
>
> "The employer shall be the sole judge of and have the right to determine, consistently with the provisions of this

agreement . . . the number of employees required on any job, or any portion of the work being done by employer.

"Section 1.03: . . . The employer reserves the right to reject persons furnished by the union.

"Neither the union nor the employer shall discriminate in the referring or hiring of employees because of age, race, color, religion, sex, national origin or union membership. In the event of a reduction of forces of a job, there shall be no discrimination in the layoff because of age."

18. The November 9, 1973, consent decree between Ironworkers Local 396 and the United States of America provided, among other things, that:

"30. Any minorities registered for referral shall be permitted to solicit and accept jobs directly from contractors, regardless of union membership. . . . [A]ny contractor may at its option hire [minorities] directly without using the routine referral procedures otherwise required by the collective bargaining agreement. . . . Local 396 will accept service dues and issue a receipt to any minority a contractor wishes to hire, regardless of the existence of unemployed members at that time. Neither Local 396 nor its agents will engage in any activities, the purpose or effect of which is to dissuade its contractors from hiring such persons, to encourage its contractors to hire union members instead of such persons, or to encourage its contractors to lay off such persons instead of union members."

19. At some time in late November, 1974, Alberici determined that the requirements of the Post Office job did not merit the maintenance of four ironworkers, and a decision was made at that time to reduce the number of ironworkers at the Post Office from four to two.

20. Alberici determined that in order to maintain its compliance with the requirements of the St. Louis Plan, a cutback in

its ironworker force required a maintenance of one minority ironworker on the site.

21. It was the convention of the industry to keep an ironworker foreman employed as well as an ironworker. Alberici determined that in order to maintain its compliance with the St. Louis Plan at the Post Office Project, the reduction of the ironworker force was to be achieved by laying off plaintiff Sisco and one other ironworker, while retaining a foreman, Raymond Swartz, and the only black ironworker at the Post Office Project, Walter Hill.

22. Walter Hill was a black male ironworker and a member of Local 396 who had been a journeyman ironworker since August 2, 1973, and who had been employed on the Post Office Project since September 5, 1974, prior to plaintiff Sisco's hiring date.

23. Walter Hill's race was taken into consideration in the determination of whether to keep him on at the Post Office Project.

24. Sisco objected to being laid off because, pursuant to the Ironworkers Collective Bargaining Agreement, the union steward was to be the last ironworker laid off besides the foreman under such a reduction in work force.

25. In response to Sisco's objection to the proposed layoff, a meeting was held at the Post Office between Alberici's EEO officer, officers and representatives of the Ironworkers' Union, and plaintiff Sisco.

26. It was agreed by both the representatives for the Ironworkers' Union, Local 396, and Alberici that in order to achieve integration goals, the Ironworkers' Collective Bargaining Agreement gave Alberici the right to completely close down the work at the Post Office and transfer all ironworkers, including plaintiff Sisco, to other jobs. Thereafter, Alberici would be able to reopen the Post Office Project and assign other ironworkers

in compliance with both the collective bargaining agreement and with the St. Louis Plan.

27. On November 29, 1974, Alberici exercised its right to close down the ironworker work in order to transfer the ironworkers off of the Post Office Project. Ironworkers, other than Sisco and Hill, were thereafter assigned to the Post Office Project in such a manner as to maintain the percentage of minority hours of ironworker employment necessary for defendant to continue to meet the goals of the St. Louis Plan. One white foreman and one black ironworker were subsequently retained at the Post Office Project.

28. Sisco was sent to Alberici's fabrication shop, and was thereafter transferred to work at Alberici's project at the Chevrolet plant.

29. Sisco was laid off from work at the Chevrolet plant on December 6, 1974.

30. Alberici terminated all work for ironworkers at the Post Office Project on or about May 8, 1975.

31. The Ironworkers' Collective Bargaining Agreement contains no provision for the recall of laid off ironworkers.

32. The Ironworkers' Collective Bargaining Agreement contains provisions regarding grievance procedures in the event of labor disputes.

33. Plaintiff Sisco did not file a grievance with the union pursuant to the terms of the Ironworkers' Collective Bargaining Agreement concerning the matters with Alberici at the Post Office.

34. Plaintiff Sisco filed his initial charge of discrimination with the EEOC on March 19, 1975.

35. Following plaintiff's layoff in December of 1974, there was a limited amount of employment available for "outside"

ironworkers of Local 396, such as plaintiff Sisco, during the winter months of 1974 and 1975.

36. Following plaintiff's layoff on December 6 from the Chevrolet plant worksite, Chevrolet rehired Alberici to provide ironworkers at the Chevrolet worksite from December 30, 1974, through January 3, 1975. The next period when work for ironworkers was again available at the Chevrolet plant occurred when plaintiff Sisco was already engaged in full-time employment with Hercules Construction Company.

37. Sisco was employed with Hercules Construction Company on December 18, 1974, and at various times thereafter. This employment resulted from plaintiff's efforts in calling Hercules Construction Company and not as a result of a referral by Local 396. Thus, Sisco was employed as an ironworker with Hercules Construction Company prior to the time that Alberici had any need for additional ironworkers at the Chevrolet plant.

38. Additionally, Sisco was engaged in work for the Franklin Crest Construction Company on December 16, 1974, and for Hercules Construction Company on December 18, 1974.

39. Sisco ended his employment with Hercules Construction Company on or about December 24, 1975.

40. Sisco was not available for work from February 11, 1975, through April 1, 1975, because of a medical condition that required surgical treatment.

41. Sisco's income from his work with Franklin Crest and Hercules Construction Companies exceeded the amounts he could have expected from his work with defendant Alberici if he had remained at either the Post Office or the Chevrolet plant projects.

42. Sisco's earnings from employment during and after the time of the events involved in this case were as follows for the indicated periods:

Calendar Year	Earnings
1974	$16,858.00
1975	13,428.00
1976	8,625.80
1977	15,961.00
1978	20,866.84

43. Ironworkers employed by Alberici in its fabrication shop, "the yard", were represented by Local 518 of the Ironworkers Union as opposed to Local 396, of which Sisco is a member. Pursuant to a contract dated January 24, 1975, between Alberici, Local 518, and Local 396, members in Sisco's Local 396 could not be employed in the fabrication shop if they were not so employed on January 25, 1975. Thus, a substantial amount of work was no longer available for Sisco by virtue of the collective bargaining agreement entered into by his bargaining agent, Local 396, and representatives of Local 518.

44. Sisco admits that his prior employment with Alberici was marked by periods of occasional layoffs. The record shows that a substantial portion of Sisco's employment with Alberici was at Alberici's fabrication shop.

Claims of Plaintiff Person Against Defendant

45. Plaintiff Person is a member of the Carpenters & Millwrights Union. This cause of action arises out of his termination from employment by defendant at the Post Office Project.

46. The majority of the work performed by members of the Carpenters Union, of which plaintiff Person was a member, on the Post Office Project was millwright work. The evidence shows that there were 50-60 millwrights and only two carpenters.

47. The Carpenters Union includes carpenters who work with wood in various ways, and millwrights who work with assembly and repair of machinery. The work of millwrights is significantly different from the work of carpenters, requiring different experience, skills, and tools.

48. For the year 1974, the St. Louis Plan set goals for employment of minority carpenters at a range of 6.7 percent to 8.2 percent minority hours of employment. For the year 1974, the percentage of minority membership of the Carpenters Union amounted to 6 percent. Alberici employed minority carpenters at the Post Office Project and achieved the following percentages of minority hours of carpenter employment for the indicated periods:

Reporting Period	Percentage of Minority Hours
12/25/73 - 1/15/74	4%
1/22/74 - 2/12/74	11
2/19/74 - 3/12/74	9
3/19/74 - 4/ 9/74	9
4/16/74 - 5/14/74	9
4/16/74 - 5/14/74	9
5/21/74 - 6/11/74	no hours for carpenters
6/18/74 - 7/ 9/74	8
7/19/74 - 8/13/74	6
8/20/74 - 9/17/74	9%
9/18/74 - 10/29/74	9
10/30/74 - 11/26/74	13
12/74	8

49. Person applied for employment with Alberici in late June or early July of 1974.

50. Person was advised by Alberici that the latter did not have need for carpenters at that time but was employing some millwrights at the Post Office.

51. Person represented to Alberici that he was an experienced millwright and a journeyman carpenter.

52. In fact, Person had never done millwright work before for a construction company and had never done any conveyor hanging or similar work of the type which he was required to do at the Post Office.

53. Based on plaintiff's representations, Person was employed by Alberici as a millwright on the Post Office Project.

54. At the Post Office, Person reported to Vern Richardson, Superintendent over all Alberici millwrights, and thereafter to Ernie Richardson, the millwright General Foreman at the Post Office.

55. Person advised Richardson that he had no prior millwright experience and was instructed to learn the trade from the other millwrights on the job.

56. Person was assigned to a work crew led by Dannie Barton, and he told Barton that he had done a little bit of millwright work.

57. It is customary in the millwright trade for the older and more experienced millwrights to supervise and instruct the younger, inexperienced millwrights.

58. Approximately a week after Person began working at the Post Office, Ernie Richardson received an initial complaint regarding Person, the substance of which was that he could not follow direction of the person with whom he was working.

59. The crew to which Person was assigned worked on the ground floor and was responsible for unloading materials and assembling portions of a conveyor system.

60. Several weeks later Person was paired with Bill Erickson, an older and more experienced millwright.

61. In the pairing of millwrights, the more experienced millwright has no formal supervisory title, but under the custom of the industry it was normal for Erickson to instruct Person.

62. Person objected to Erickson's instructing him and felt that Erickson was acting as a foreman and that Person was acting as a laborer under the arrangement. Person objected to the tone and manner of Erickson's voice and his suggestive manners.

63. Approximately a week before Person was transferred from the Post Office worksite, Erickson complained to Ernie Richardson, millwright General Foreman, that Person refused to do what he was instructed to do and that Erickson refused to work any longer with Person.

64. Members of Barton's millwright crew refused to work with Person because he wouldn't listen and follow directions when members of the crew tried to instruct him on how to perform various jobs. Person felt discriminated against because Erickson did not always assist in unloading trucks. In unloading trucks, Person performed the same work as did the other men in his crew.

65. Person experienced what he described as a personality clash with Erickson because of Erickson's age.

66. Barton advised Ernie Richardson, millwright General Foreman, of Erickson's problems and was told to send Erickson to see Ernie Richardson.

67. No written complaint was issued to Person from his foreman, Mr. Barton, and it was not the practice in the construction trade with carpenters to issue such written complaints.

68. Barton placed Person with different members of his crew and Person experienced the same type of problems with each of them.

69. After a lengthy period of alternate placements, Barton concluded that Person should be discharged because of his uncooperative attitude.

70. Ernie Richardson spoke to Person regarding the complaint. He encouraged Person to try to get along better with the members of his work crew, and told him that each new person in the construction or millwright union was treated in the same manner as was Person.

71. After several discussions were held regarding Person's inability to get along with fellow coworkers, Don Carlson, the Post Office Project manager for Alberici, discussed with Mr. Bartnett, Alberici's EEO officer, the fact that Person was a minority group member on the Post Office Project who was not qualified to perform the work and could not function properly.

72. Vernon Richardson, superintendent of all millwrights for Alberici, informed Bartnett that Person was unqualified and did not have an attitude for learning.

73. Bartnett, as Alberici's EEO officer, advised Carlson that if Person was not qualified to do the work, it was not an EEO matter and he should be discharged.

74. Bartnett received no official complaint from Person regarding the alleged discrimination.

75. Because of Person's inability to do millwright work, he was laid off on August 5, 1974.

76. Thereafter, Person met with Edward Calcaterra and sought reemployment. Calcaterra advised Person that no millwright work was then available, and that he would try to place him as a carpenter. Person then advised Calcaterra that he did not want to work as a carpenter but requested to be reemployed as a millwright, a position with which Person had little or no experience.

77. On August 8, 1974, after Person was laid off, he filed a grievance with the Carpenters Union.

78. Person's grievance was denied by the Carpenters Union on or about August 20, 1974, on the basis that plaintiff's complaint arose from personality differences with coworkers as opposed to racial discrimination on the part of defendant Alberici.

79. Thereafter, Person secured employment with the Rallo-Alberici Joint Venture at the Convention Center on August 21, 1974 as a carpenter.

80. Person was paid the same rate of pay as he was at the Alberici Construction Company prior to his layoff.

81. Person voluntarily quit his work with Rallo Contracting Company, Inc., to work for Ralston Purina Company as a carpenter on a permanent basis. Person worked with Ralston Purina until April, 1978, when he voluntarily quit work to go into business for himself.

82. Person's earnings form employment during and after the time of the events involved in this case were as follows for the indicated periods:

Calendar Year	Earnings
1974	$10,262
1975	13,711
1976	14,582
1977	17,803
1978	9,800

Conclusions of Law

1. The action brought by plaintiff Person is predicated on 42 U.S.C. § 1981. This Court has jurisdiction pursuant to 28 U.S.C. § 1343.

2. The action brought by Sisco is predicated upon 42 U.S.C. § 1981 and 2000e, *et seq.* The Court has jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5(f).

3. Defendant Alberici is an employer within the meaning of Title VII of the Civil Rights Act of 1964.

4. Affirmative action programs establishing favorable employment quotas for members of minority groups are not per se unconstitutional or illegal, and defendant's actions pursuant to the St. Louis Plan are permissible under the circumstances in this case. *E.E.O.C.* v. *Contour Chair Lounge Co., Inc.*, 596 F.2d 809 (8th Cir. 1979).

5. The St. Louis Plan and Executive Order 11246 implementing affirmative action plans on government contractors are a valid exercise of executive power. *Contractor's Assn. of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971).

6. Title VII does not prohibit all race conscious affirmative action. *United SteelWorkers of America, AFL-CIO* v. *Weber, et al.*, ____ U.S. ____ (decided June 27, 1979).

7. The Legislative History of Equal Employment Opportunity Act of 1972 establishes that Executive Order 11246 and the St. Louis Plan established pursuant thereto do no conflict with the requirements of Title VII.

8. In this case, defendant Alberici, acting with due regard to the St. Louis Plan and with knowledge of the consent decree entered into between plaintiff Sisco's union and defendant, decided to terminate Sisco's employment. Its decision to terminate plaintiff Sisco was not based on discrimination because of race. Therefore, plaintiff Sisco is not entitled to recover under Section 1981 and Title VII. The black retained had been employed prior to plaintiff Sisco and had more seniority on the job.

9. A punitive damage award in favor of plaintiff Sisco is inappropriate under the facts in this case, in that defendant has not been shown to have acted in willful disregard of clear existing law.

10. The termination of Person by Alberici was because of Person's lack of qualifications to perform his work as a millwright and not because of his race. As such, his termination did not violate 42 U.S.C. § 1981. *Christian* v. *General Motors Corporation,* 341 F. Supp. 1209 (E.D. Mo. 1972), *aff'd,* 475 F.2d 1407 (8th Cir. 1973).

11. Alberici's offer to reemploy Person after his layoff as a carpenter, which offer was rejected, terminates Alberici's liability, if any, to Person for back pay as of the date of the offer. *NLRB* v. *Bishop,* 228 F.2d 68 (6th Cir. 1955).

12. Even if Person were entitled to recovery, his voluntary abandonment of his subsequent employment with Rallo Contracting Company, Inc., terminated Alberici's liability for back pay as of the date of this abandonment. *McLaughlin* v. *Mercury Freight Lines, Inc.,* 5 E.P.D. § 8560 (1972), *aff'd,* 472 F.2d 1406 (8th Cir. 1973).

13. Because defendant has not been shown to have acted recklessly or in willful disregard of clear existing law, plaintiff Person is not entitled to recover punitive damages in this case.

14. Defendant's motion for attorneys' fees in this case is denied.

Dated this 24th day of April, 1980.

/s/ J.H. Meredith
United Stated District Judge

APPENDIX C

Chester W. Setser, Appellant,

v.

Novack Investment Company
d/b/a Budig Western Trucking and
Alvin S. Novack, Appellees.

No. 80-1100.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 13, 1980.

Decided Jan. 26, 1981.

Michael J. Hoare, Chackes & Hoare, St. Louis, Mo., for appellant.

H. Kent Munson, Stein & Seigel, St. Louis, Mo., for appellees.

Before STEPHENSON and HENLEY, Circuit Judges, and HUNTER,* District Judge.

ELMO B. HUNTER, District Judge.

This is an appeal from a final judgment entered below against the appellant Chester Setser and in favor of appellees Novack Investment Co. d/b/a Budig Western Trucking Co. and Alvin S. Novack.[1] For the following reasons, we reverse and remand for jury trial.

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* The Honorable Elmo B. Hunter, Chief Judge, United States District Court for the Western District of Missouri, sitting by designation.

[1] The case was tried to the district court on July 17-19, 1978, and on January 7, 1980, the district court entered its Memorandum and Order in favor of appellees.

Appellant brought his action alleging only violations of 42 U.S.C.A. § 1981 [§ 1981].[2] Appellant, a white male, contended in the district court that he was refused employment with appellees in the fall of 1973 for the unlawful reasons of racial discrimination and retaliation by appellees after appellant filed a charge of discrimination with the Equal Employment Opportunity Commission [EEOC]. Appellant argues on appeal that the district court erred in striking his demand for jury trial and that the district court erroneously found that the appellees did not discriminate or retaliate against appellant. Appellees contend that even if they did discriminate, they did so lawfully because they were following affirmative action guidelines pursuant to Executive Order 11246.[3] Further, appellees assert that as a matter of law retaliation is not cognizable as a cause of action under § 1981.

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[2] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[3] This regulation requires that as a matter of public policy, federal contractors adopt affirmative action policies to prevent discrimination against any employee or applicant for employment because of race, color, religion or national origin. *See* 3 C.F.R. § 339. Appellees were, in part, government contractors and were covered by this regulation. *See United Steelworkers of America* v. *Weber*, 443 U.S. 193, 223 n.2, 99 S.Ct. 2721, 2726, n.2, 61 L.Ed.2d 480 (1979). For an exhaustive study of the background of Executive Order 11246, *see Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159, 168-71 (3d Cir. 1971); and Comment, *Executive Order No. 11246: Presidential Power to Regulate Employment Discrimination*, 43 Mo.L.Rev. 451 (1978).

I.

[1] The complaint sought only monetary damages for backpay, lost insurance benefits, expenses incurred in seeking alternative employment, inconvenience, humiliation and embarrassment, pain and suffering, punitive damages, interest, attorneys' fees and costs. The appellant moved for a jury trial and the appellees opposed such a request only for the claims seeking lost wages, interest, attorneys' fees and costs. On November 8, 1977, the district court, *sua sponte,* entered its order denying appellant's demand for jury trial on all issues. The district court's order explained the ruling by stating that "this court has consistently held that a jury trial is unavailable in § 1981 cases."

Appellant argues that there is a constitutional guarantee of the right to a jury trial under the Seventh Amendment in an action brought pursuant to § 1981 on all claims for "legal" relief.[4] Even though the Supreme Court has yet to identify specifically the parameters of the jury trial right in § 1981 actions, an analysis of various judicial authorities indicates that parties are constitutionally entitled to jury trials under § 1981 on all legal claims. The Supreme Court has definitively held that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in ordinary courts of law." *Curtis* v. *Loether,* 415 U.S. 189, 194, 94 S.Ct. 1005, 1008, 39 L.Ed.2d 260 (1974).[5] And, it is

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[4] Appellant does not contend that attorneys' fees, interest and costs should be jury issues.

[5] *Curtis* v. *Loether, supra,* allows jury trials in actions brought under Title VIII of the Civil Rights Act of 1968. Many other statutory remedies have been held to afford the right to jury trial for legal claims. *See Curtis* v. *Loether, supra,* 415 U.S. at 193, 94 S.Ct. at 1007. Also, we note that actions framed under 42 U.S.C. § 1983 can afford the jury trail right. *See Hildebrand* v. *Board of Trustees,* 607 F.2d 705 (6th Cir. 1979); *Duchesne* v. *Sugarman,* 566 F.2d 817 (2d Cir. 1977); and *Drone* v. *Hutto,* 565 F.2d 543 (8th Cir. 1977).

clearly settled that actions brought pursuant to § 1981 afford plaintiffs both legal and equitable relief. *See Johnson* v. *Railway Express Agency,* 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). The legal rights available include "compensatory and, under certain circumstances, punitive damages." *Johnson* v. *Railway Express Agency, supra,* 421 U.S. at 460, 95 S.Ct. at 1720. *See also Johnson* v. *Ryder Truck Lines, Inc.,* 575 F.2d 471 (4th Cir. 1978); *Garner* v. *Giarrusso,* 575 F.2d 300 (5th Cir. 1978); *Mahone* v. *Waddle,* 564 F.2d 1018 (3d Cir. 1977); *McCrary* v. *Runyon,* 515 F.2d 1082 (4th Cir. 1975), *aff'd.,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976); *Tucker* v. *Harley Davidson Motor Co.,* 454 F.Supp. 738, 743 (D.Wis.1978); *Peterson* v. *Lehigh Valley Dist. Council,* 453 F.Supp. 735 (E.D.Pa. 1978). Further, many lower courts have recognized the appropriateness of submitting all legal contentions encompassed within a § 1981 cause of action to the jury. *See Santos* v. *Mt. Sinai Hospital,* (S.D.N.Y. 1980); *Seymore* v. *Reader's Digest Ass'n., Inc.,* 493 F.Supp. 257, 267 (S.D.N.Y.1980); *Johnson* v. *Sea Drilling Corp.,* 486 F.Supp. 462, 463-64 (E.D.La.1980); *McCray* v. *Standard Oil Co.,* 76 F.R.D. 490, 501 (N.D.Ill. 1977); *Saad* v. *Burns Intern. Sec. Services, Inc.,* 456 F.Supp. 33 (D.D.C.1978); *Miller* v. *Doctors General Hospital,* 76 F.R.D. 136 (D.Okl.1977); *Tucker* v. *Harley Davidson Motor Co., supra,* 454 F.Supp. at 744; *Marshall* v. *Electric Hose & Rubber Co.,* 413 F.Supp. 663, 666-68 (D.Del.1976); *but compare Blum* v. *Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Cir. 1979); *and Baker* v. *City of Detroit,* 458 F.Supp. 379, 384 (E.D.Mich.1978). We agree with appellant that the district court erred in not granting a jury trial in an action based on § 1981 on all legal claims.

Having concluded that appellant is entitled to a jury trial on all of his legal claims, we are next confronted with appellant's argument that backpay should properly be characterized as a legal damage and thus be an issue for the jury. The question of the proper characterization of backpay arises here in the unusual context of a plaintiff who is not also seeking the

equitable remedy of reinstatement. *See Lynch* v. *Pan American World Airways,* 475 F.2d 764, 765 (5th Cir. 1973); *Booker* v. *Electrical Workers Union, Local 2021 IBEW (ALF-CIO),* 431 F.Supp. 1035, 1036-37 (D.Okl.1977); *Flores* v. *Local 25 International Brotherhood of Electrical Workers, AFL-CIO,* 407 F.Supp. 218, 220 (E.D.N.Y.1976); *see also Donoghue* v. *Behler,* 429 F.Supp. 403, 406 (D.N.J.1977). Basically, it seems that two rationales have supported the characterization of backpay as an equitable remedy in employment discrimination cases. First, many courts have concluded that backpay is incidental to the much broader equitable remedy of reinstatement, *see Lynch* v. *Pan American World Airways, supra.* And second, various courts have analogized backpay to the equitable doctrine of restitution. *See, e. g., Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1972); *Equal Employment Opportunity Commission* v. *Detroit Edison Co.,* 515 F.2d 301, 308 (6th Cir. 1975), *vacated on other grounds,* 431 U.S. 951, 97 S.Ct. 2668, 53 L.Ed.2d 267 (1977); *Harkless* v. *Sweeney Independent School District,* 427 F.2d 319, 324 (5th Cir. 1970); and *Demkowicz* v. *Endry,* 411 F.Supp. 1184, 1191 (S.D.Ohio 1975). After a careful examination, we find both rationales to be of questionable merit in an action brought pursuant to § 1981.[6]

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[6] There is a third possible rationale for characterizing backpay as equitable. The Supreme Court has reasoned that because awards of backpay under Title VII are discretionary, then such awards are equitable in nature. *See Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 44-243, 95 S.Ct. 2362, 2384, 45 L.Ed.2d 280 (1975) (Rehnquist, J., concurring). This rationale does not transfer into the § 1981 arena because § 1981 contains none of the discretionary language contained in Title VII. Further, as Justice Rehnquist noted, the Supreme Court's cut-back on the discretion the district judges have to award backpay in Title VII actions renders such awards more in the nature of legal damages. *Albemarle Paper Co.* v. *Moody, supra.*

The courts that have included backpay as an adjunct equitable remedy to reinstatement have analogized claims brought under § 1981 to Title VII claims, where there is seeming unanimity of judicial thinking interpreting that statute as providing solely equitable relief.[7] *See Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1975); *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978); *Slack* v. *Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *see also Hildebrand* v. *Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1975); and Comment, *Developments—Title VII*, 84 Harv.L.Rev. 1109, 1265-66 (1971). While Congress apparently intended only court granted relief in Title VII, *see Curtis* v. *Loether, supra*, 415 U.S. at 197, 94 S.Ct. at 1009; *Lorillard* v. *Pons, supra*, 434 U.S. at 584-85, 98 S.Ct. at 872, no such limitation is apparent under § 1981. *See Johnson* v. *Railway Express Agency, supra*, 421 U.S. at 459-60, 95 S.Ct. at 1719-1720. Further, the judicial analysis that has construed backpay as incidental to reinstatement appears to be the theoretical equivalent of the repudiated "clean-up doctrine" in equity. *See Dairy Queen* v. *Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Ross* v. *Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970); and James & Hazard, Civil Procedure, Ch. 8 (2d ed. 1977).[8]

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[7] Nevertheless, some commentators have criticized the characterization of backpay as equitable in Title VII actions. *See* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW.U.L.Rev. 486, 526-30 (1975); Comment, *Developments—Section 1981*, 15 Harv.Civ. Rights—Civ.Lib.L.Rev. 29, 250 (1980). Interestingly, the Supreme Court has expressly left the jury trial right an open question in Title VII actions. *See Lorillard* v. *Pons*, 434 U.S. 575, 583-84, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978); and *Curtis* v. *Loether, supra*, 415 U.S. at 196-97, 94 S.Ct. at 1009 (1974).

[8] As the Supreme Court noted in *Ross* v. *Bernhard:*

Implicit within the analysis used by courts holding that backpay should be awarded as an incident to reinstatement is the recognition that backpay is somehow dissimilar to traditional equitable remedies. Some courts have attempted to liken backpay to a form of restitution in order to characterize backpay as equitable. *See Equal Employment Opportunity Commission* v. *Detroit Edison Co., supra; Robinson* v. *Lorillard Corp., supra;* and *Demkowicz* v. *Endry, supra.* Such characterization appears to us to misconceive the concept of restitution.[9] In essence, restitution seeks to return to an injured party that which a wrongdoer has taken away. *See* Restatement, Restitution, § 1-2 (1937); *Samuel* v. *University of Pittsburgh,* 375 F.Supp. 1119, 1135 (W.D.Pa.1974); *Newco Land Co.* v. *Martin,* 358 Mo. 99, 213 S.W.2d 504, 510 (Mo.1948); *Savage-Scofield Co.* v. *City of Tacoma, et al.,* 105 P. 1032 (Wash.1909). In many instances of § 1981 discrimination in an employment context, the injured party has not conferred any benefit on the alleged wrongdoer that would warrant a restitutionary recovery for backpay. This is certainly true, as here, in a case of wrongful refusal to hire. But, it is also true in many situations of unlawful firings and unlawful failures to promote. *See* Comment, *Developments—Section 1981, supra,* 15 Harv.Civ. Rights—Civ.Lib.L.Rev. at 250.

> ... [W]here equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed by either trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.

396 U.S. at 537-38, 90 S.Ct. at 737-738.

[9] Indeed, restitution is suited both to actions at law and in equity depending upon the nature of the rights sought to be vindicated. *See Bernstein* v. *Universal Pictures, Inc.,* 79 F.R.D. 59, 67 (S.D.N.Y.1978); and *Polstorff* v. *Fletcher,* 430 F.Supp. 592, 595 (N.D.Ala.1977).

[2] In our view, the remedy of backpay in § 1981 cases is more appropriately characterized as a compensatory, legal damage. A number of district courts already have adopted this view. *See Santos* v. *Mt. Sinai Hospital, supra; Partin* v. *St. Johnsbury Co., Inc.*, 447 F.Supp. 1297, 1303 n.6 (D.R.I.1978); *Devore* v. *Edgefield County School District*, 68 F.R.D. 423, 427 (D.S.C.1975).[10] We conclude that backpay or lost wage determinations are inherently in the nature of legal damages.[11] The calculations necessary to determine the hours of lost work stemming from a § 1981 violation are straight forward damage computations certainly within the practical capabilities of juries. *See, e. g., Pons* v. *Lorillard, supra*, 549 F.2d at 954.[12] In sum, we hold that the district court erred in denying appellant's demand for jury trial on all of his legal claims including his claim for backpay.

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[10] And other courts (even though sitting in equity) have recognized the validity of characterizing backpay awards as a type of compensatory damage in § 1981 actions. *See Faraca* v. *Clements*, 506 F.2d 956, 959-60 (5th Cir. 1975); and *Smith* v. *Board of Education of Morrilton School District No. 32*, 365 F.2d 770, 784 (8th Cir. 1966).

[11] We note that in other contexts courts have construed backpay as a compensatory or legal damage as opposed to a form of equitable relief. *See Paxman* v. *Campbell*, 612 F.2d 848, 857-58 (4th Cir. 1980) (§ 1983 action); *Wehr* v. *Burroughs Corp.*, 438 F.Supp. 1052, 1056-58 (E.D.Pa.1977) and *Pons* v. *Lorillard*, 549 F.2d 950, 954 (4th Cir. 1977), *aff'd., Lorillard* v. *Pons, supra*, 434 U.S. at 582-85, 98 S.Ct. at 871-872 (age discrimination actions). As well, we observe that in many common law actions involving employment relationships and otherwise, juries have traditionally been called upon to compute lost wages or backpay as a measure of legal damage. *See Sampson* v. *Mo. Pac. R. Co.*, 560 S.W.2d 573, 587-89 (Mo. en banc 1978); *Sanders* v. *H. & S. Motor Freight, Inc.*, 526 S.W.2d 332, 336-37 (Mo.App.1975); and *Effinger* v. *Bank of St. Louis*, 467 S.W.2d 291, 297 (Mo.App.1971) (negligence actions).

[12] While appellees did not raise the usual policy objections to the use of jury trials, *i. e.*, delay and possible prejudice, we observe that the validity of these policy objections has been seriously challenged.

[3] In anticipation of the foregoing conclusion, appellees argued that the evidence presented at trial failed to develop a submissible case.[13] After a very careful review of the entire record in this case, it is apparent that there was a marked degree of conflicting evidence by a jury. As such, we are satisfied that it is not possible to conclude as a matter of law that the appellant failed to produce a submissible case on the issues of liability or damages.[14] *See generally Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S.Ct. 780, 783, 7 L.Ed.2d 798 (1962); and *Madrid* v. *Mine Safety Appliance Co.*, 486 F.2d 856 (10th Cir. 1973).

II.

We are next confronted with appellees' difficult argument that even if they had engaged in discriminatory practices regarding appellant, they did so "lawfully" insofar as they were attempting to comply with a governmentally encouraged affir-

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The Supreme Court recognized in *Curtis* v. *Loether, supra,* 415 U.S. at 198, 94 S.Ct. at 1010, that any prejudice reflected in jury action can be easily corrected through the trial judge's power to direct a verdict, grant judgment notwithstanding the verdict or a new trial. Also, as one commentator has discovered, plaintiffs and defendants appear to move for jury trial in § 1981 actions with nearly equal frequency. *See* Comment, *Developments—Section 1981, supra,* 15 Harv.Civ.Rights—Civ.Lib.L.Rev. at 255. Further, the objection regarding delay has been found to be of unsound merit, *id.* at 254-56, especially in light of the constitutional considerations. *Curtis* v. *Loether, supra,* 415 U.S. at 198, 94 S.Ct. at 1010.

[13] This was the major focus of appellees' oral argument.

[14] In their brief, appellees asserted that we should accept the fact findings of the district court and affirm under the clearly erroneous standard of reivew. As we have already concluded that the district court erred in not granting a jury trial, appellees' argument is inapposite as the fact finding duty should have properly been a jury function.

mative action plan.[15] Essentially, appellees contend that their reliance on their affirmative action plan adopted pursuant to Executive Order 11246 constitutes an absolute bar to a cause of action under § 1981 by a white individual for alleged racial discrimination. Appellant argues that when he applied for employment with appellees he was told, in effect, that if he were black he would have been hired. As such, appellant's position is that appellees' "but for" conduct states a violation fo § 1981 and appellant should be able to proceed with an action for money damages.

[4] The threshold issue that we must determine is whether appellant has arguably stated a cause of action under § 1981 based on his allegations. The Supreme Court has grappled with the concept of "reverse discrimination" in a number of recent decisions. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *University of California Regents* v. *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979); *Fullilove* v. *Klutznick*, ____ U.S. ____, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). The entire history of judicial analysis in this toubling area has been checkered. *See* Boyd, *Affirmative Action in Employment—The Weber Decision*, 66 Iowa L.Rev. 1 (1980); and *United States* v. *City of Miami, Fla.*, 614 F.2d 1322, 1337 (5th Cir. 1980).[16] Nevertheless, the Supreme Court in *Weber* has

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[15] Appellees submit that at the time of appellant's first rejection for employment, they were under intense pressure from the Justice Department and a United States Government Contract Compliance Officer to employ more minority drivers.

[16] We note the Supreme Court's own reluctance to adopt clear lines in reviewing the legal sufficiency of affirmative action plans:

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line.

United Steelworkers of America v. *Weber, supra*, 443 U.S. at 208, 99 S.Ct. at 2726. *Also see generally* Justice Rehnquist's dissent in *Weber*, 443 U.S. at 219-255, 99 S.Ct. at 2735.

indicated that no absolute bars may be erected that completely preclude the advancement of white individuals. *United Steelworkers of America* v. *Weber, supra,* 443 U.S. at 208, 99 S.Ct. at 2726; *see also University of California Regents* v. *Bakke, supra;* and *Moseley* v. *Goodyear Tire & Rubber Co.*, 612 F.2d 187, 191 (5th Cir. 1980). We believe that under appellant's version of the facts in this action there is established a cause of action under § 1981. Assuming appellant was told that but for his race a job would have been available to him,[17] then appellees have created an absolute preclusion of whites from consideration for employment. Appellees' argument that reliance on their affirmative action program gives them, in essence, a license to discriminate on racial grounds cannot be accepted. We refuse to agree that the institution of an affirmative action plan absolutely sanctions racial discrimination.[18] While we agree that the government as well as private employers have an interest in promoting the substantial societal goal of advanc-

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[17] In so assuming, we express no opinion on the factual controversy over what appellant was or was not told during his meetings with appellees in connection with his applicaton for employment.

[18] Although writing in a constitution context, we note the views of Justice Powell in *Bakke:*

> In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the change to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.
>
> The fatal flaw in petitioner's preferential program is its disregard of individual rights ....

438 U.S. at 319-20, 98 S.Ct. at 2763.

ing the concept of affirmative action, we do not agree that an employer solely on the basis of race can refuse to even consider the application of a white individual. Such a practice, in our view, creates the type of absolute bar or preclusion forbidden by the Supreme Court.

This determination in light of the damage action nature of this case leads us into the unchartered area of the relief available to appellant. Given that the Supreme Court has seemingly approved certain voluntary affirmative action programs that address racial imbalances in actions seeking injunctive relief, *see United Steelworkers of America* v. *Weber, supra,*[19] there are still unresolved questions regarding the nature of the legal relief, if any, that a white employee or applicant who is subjected to an illegal implementation of an affirmative action plan is entitled.

In this appeal we are presented with a claim exclusively for money damages. The Supreme Court in *Franks* v. *Bowman Transportation Co., supra,* left unanswered the question of whether an employee who is adversely affected by an affirmative action plan has a cause of action for money damages. Chief Justice Burger, while concurring in part and dissenting in part, noted that

> ... competitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be

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[19] Various courts have suggested that injuctive relief is inappropriate because it could thwart the legitimate goals of an employer's affirmative action plan. *See Detroit Police Officers' Ass'n.* v. *Young,* 608 F.2d 671 (6th Cir. 1979); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1972), *cert. denied,* 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); *McAleer* v. *American Tel. & Tel. Co.,* 416 F.Supp. 435 (D.D.C. 1976); *German* v. *Kipp,* 429 F.Supp. 1323 (W.D.Mo.1977), *vacated as moot,* 572 F.2d 1258 (8th Cir. 1978); *see also Franks* v. *Bowman Transportation Co., supra.*

> a monetary award to the person suffering the discrimination .... Such monetary relief would serve the dual purpose of deterring wrongdoing by the employer or union—or both—as well as protecting the rights of innocent employees. *Id.* at 780-81, 96 S.Ct. at 1271; *see also* the majority opinion at 777 n.38, 96 S.Ct. at 1270 n.38.

And, Justice Powell observed that

> [t]he second, and in my view controlling distinction between these types of relief is the impact on other workers. As noted above, the granting of backpay and of benefit-type seniority furthers the prophylactic and make whole objectives of the statute without penalizing other workers. But competitive seniority benefits, as the term implies, directly implicates the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers. Putting it differently, those disadvantaged—sometimes to the extent of losing their jobs entirely—are not the wrongdoers who have no claim to the Chancellor's conscience, but rather are innocent third parties.

Id. 424 U.S. at 788, 96 S.Ct. at 1276. *See also* Justice Powell's views in *University of California Regents* v. *Bakke,* 438 U.S. 265, 310, 98 S.Ct. 2733, 2758, 57 L.Ed.2d 750 (1978).

[5] Appellant argues that without a cause of action for money damages, he would bear the burden for correcting appellees' past history of discrimination that prompted the necessity for appellees' affirmative action plan. Thus, appellant submits that the appellees would remedy their past abuses during the interim period required to fulfill the goals of their affirmative action program at the appellant's expense. We agree that the proper allocation of the burden for rectifying past discrimination

should be placed upon wrongdoing employers instead of innocent employees or applicants.[20]

[6] A number of courts have already recognized the utility of the monetary damage remedy outlined in *Franks*. *See Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 859 (5th Cir. 1977); *Kizer* v. *Webster*, 492 F.Supp. 1135, 1149-50 (D.D.C.1980); *Harmon* v. *San Diego County*, 477 F.Supp. 1084, 1092 (S.D.Cal.1979); *McAleer* v. *American Tel. & Tel. Co., supra*, 416 F.Supp. at 439-40; *German* v. *Kipp, supra*, 429 F.Supp. at 1338, n.25; and *see* Note, 26 DePaul L.Rev. 158 (1976); and Stern, *Retroactive Seniority as a Remedy for Title VII Violations: Relief To Newly Hired and Incumbent Employees in Light of Franks* v. *Bowman*, 22 Loyola L.Rev. 923 (1976). Similarly, in an action for money damages, we are persuaded that an alleged violation of § 1981 cannot be obviated by simple reliance upon an affirmative action plan. Therefore, we hold that appellees' efforts to institute an affirmative action plan do not bar appellant as a matter of law from seeking a monetary award from the jury for his legal claims.

Our conclusion is tempered with the recognition that allowing a white plaintiff a cause of action for money damages in an ap-

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[20] We are generally in agreement with Judge Gesell's opinion in *McAleer* v. *American Tel. & Tel. Co., supra:*

> Apparently common to the various opinions in *Franks* was a recognition of the need to share among the respective parties the burden of eradicating past discrimination and achieving equality of employment opportunities. In particular, it was agreed that courts should attempt to protect innocent employees by placing this burden on the wrongdoing employer whenever possible .... This Court, agreeing with these sentiments, sees no reason why in equitably distributing the burden among the concerned parties the onus should be shifted from the employers responsible for the discrimination to the blameless third party employee any more than is, as a practical matter, unavoidable.

416 F.Supp. at 440.

propriate case places employers who are implementing affirmative action plans in potentially awkward posions. *See Telephone Wkrs.* v. *New Jersey Bell Tel. Co.*, 450 F.Supp. 284, 298 (D.N.J.1977). Nevertheless, to conclude as appellees argue, that an employer who is attempting to implement an affirmative action plan is immune from suit under § 1981 would present a situation of fundamental unfairness. For instance, it is possible that an employer could be implementing an invalid plan, or even if valid, the employer could misapply it in a given situation. To deny any cause of action to a white individual merely because his employer or prospective employer asserts the existence of an affirmative action plan could create the potential for abuse by employers.

[7] Having concluded that appellant is not absolutely barred from asserting his legal claims under § 1981, we must now clarify the relationship between appellant's cause of action and appellees' efforts to institute their affirmative action policies. In our view, appellees' alleged reliance upon their affirmative action plan creates factual questions for the jury both on the issues of the bona fide nature of the plan as well as on the proper implementation of the plan to appellant's application for employment.[21] Thus, appellees' affirmative action plan should be treated as in the nature of an affirmative defense to a charge of racial discrimination under § 1981. To establish such a defense, the appellees will be required to produce evidence on the components of their affirmative action plan that will support an instruction of the jury regarding the requisite elements of a valid affirmative action plan. *See generally University of California Regents* v. *Bakke, supra; United Steelworkers of America* v. *Weber, supra; Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 772-73, 96 S.Ct. at 1267; *Detroit Police*

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[21] Appellees contend in their brief and at trial that they had implemented a valid affirmative action program and disputed appellant's allegations that he had been told that he was not hired because of his race.

Officers' Ass'n. v. *Young, supra,* 608 F.2d at 696; *Moseley* v. *Goodyear Tire & Rubber Co.,* 612 F.2d at 191; *Legal Aid Society of Alameda City* v. *Brennan,* 608 F.2d 1319, 1343 (5th Cir. 1979); *E. E. O. C.* v. *Contour Chair Lounge Co.,* 596 F.2d 809,814 (8th Cir. 1979). As a second step, appellees will be required to show that their decision not to hire appellant was based upon a proper implementation of a legitimate affirmative action plan in accordance with its provisions. In this manner, appellees will be able to bring forth evidence of their efforts to institute and effectuate a valid affirmative action plan as well as their desire to advance the desired social goals and objectives of their affirmative action program. Insum, the factual basis of appellees' defense of an affirmative action plan must be thoroughly tested before the appellees can be entitled to an instruction that will establish the defense of a legitimate, properly applied affirmative action plan to a set of factual allegations that would in the absence of such a plan produce a submissible cause of action under § 1981.

We realize that this appeal posits the difficult problem of reverse discrimination in the context of appellant's Seventh Amendment right to a jury trial. Nevertheless, we believe that the foregoing accommodation between the strongly competing interests presented in this appeal will allow for a full airing of this controversy. Appellant will not be prevented from attempting to establish the elements of a § 1981 cause of action and the appellees will be able to attempt to demonstrate the defense of a proper application of valid affirmative action policies to appellant's application for employment. We are persuaded that this procedure will afford the parties the fairest framework in which to present their case to the jury.

III.

Lastly, appellees argued that there is no cause of action for the retaliation appellant alleges under § 1981.[22] Appellees' theory is essentially in two parts. First, appellees contend that there may be no racial connection between an applicant's complaint to the EEOC and the alleged retaliation. Second, appellees contend that the sole avenue to redress retaliation charges in an employment context is Section 704(a) of Title VII. Appellees reason that to allow a claim of retaliation against employers pursuant to § 1981 would subvert the procedural mechanisms established within Title VII to address retaliatory claims.

[8] We do not accept appellees' contention that a retaliatory action against a prospective employee for attempting to enforce rights under § 1981 might not be based on *any* racial discrimination. While it is conceivable that an applicant could incorrectly believe that he or she was the victim of racial discrimination prompting the filing of a complaint, a retaliatory response by an employer against such an applicant who genuinely believed in the merits of his or her complaint would inherently be in the nature of a racial situation. *See Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977). Judicial recognition of appellees' distinction could lead courts into the factual mire of determining whether a retaliatory act was based purely on non-racial criteria. In any event, to deny appellant a cause of action for retaliatory acts resulting from pursuing a claim under § 1981 would have the effect of giving "impetus to the perpetuation of racial discrimination." *Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center,* 80 F.R.D. 254, 266 (N.D.Ill.1978); *accord,*

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[22] It appears that the district court concluded that there is a cause of action for retaliation under § 1981, but held against appellant on the issue. *See* Memorandum Opinion, filed January 7, 1980; and Memorandum, filed November 8, 1977.

Winston v. *Lear-Siegler, Inc., supra; Ragheb* v. *Blue Cross & Blue Shield of Michigan,* 467 F.Supp. 94, 95-6 (E.D.Mich. 1979); *Fralin & Waldron, Inc.* v. *County of Henrico, Va.,* 474 F.Supp. 1315, 1322 (E.D.Va.1979); *Liotta* v. *National Forge Co.,* 473 F.Supp. 1139, 1145-46 (W.D.Pa.1979); *McClain* v. *Mack Trucks, Inc.,* 81 F.R.D. 730, 733 (E.D.Pa.1979); *National Organization for Women* v. *Sperry Rand Corp.,* 457 F.Supp. 1338, 1346 (D.Conn.1978); *Strozier* v. *General Motors,* 442 F.Supp. 475, 480 (N.D.Ga.1975), *appeal dismissed,* 584 F.2d 755 (5th Cir. 1978); and *see generally Des Vergnes* v. *Sukonk Water Dist.,* 601 F.2d 9 (1st Cir. 1979); *DeMatteis* v. *Eastmen Kodak Co.,* 511 F.2d 306 (2d Cir. 1975?; *Windsor* v. *Bethesda General Hospital,* 523 F.2d 891 (8th Cir. 1975); and *Cubas* v. *Rapid Am. Corp., Inc.,* 420 F.Supp. 663 (E.D.Pa. 1976).

Appellees rely heavily on the recent Supreme Court decision in *Great American S. & L. Assn.* v. *Novotny,* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), for their argument that the sole remedy for retaliation claims in a race discrimination conflict is Title VII. *Novotny* held that the rights created by Title VII could not be asserted through 42 U.S.C. § 1985(c). The Supreme Court reasoned that since § 1985(c) created no substantive rights and is merely a remedial provision, to allow a claim under § 1985(c) based upon a right created by Title VII would allow a complainant to avoid "most if not all of [the] detailed and specific provisions of [Title VII]." *Id.* at 375-76, 99 S.Ct. at 2350-2351. Similarly, appellee argues that because appellant apparently failed to file his claim for retaliation with the EEOC in a timely fashion, pursuit of a § 1981 retaliation claim at this juncture would thwart the procedural mechanisms of Title VII. We do not agree.

[9, 10] Section 1981 creates substantive rights of its own that are redressable quite apart from Title VII. *See Johnson* v. *Railway Express Agency, supra,* 421 U.S. at 457-61, 95 S.Ct. at 1718-1720; and *Liotta* v. *National Forge Co., supra,* 473

F.Supp. at 1146. The Supreme Court in *Novotny* recognized this distinction in reviewing the effect of "contemporary legislation" on the 19th century Civil Rights Acts. "... [W]e held that the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the same 19th century statute and now codified at 42 U.S.C. § 1981." *Great American S. & L. Assn.* v. *Novotny, supra,* 442 U.S. at 377, 99 S.Ct. at 2351 (*citing Johnson* v. *Railway Express Agency, supra*). As Title VII and § 1981 involve two independent causes of action, the procedures that are a part of Title VII enforcement do not affect the ability of appellant to proceed with his § 1981 claims.

Therefore, we hold that a § 1981 cause of action encompasses appellant's allegations of retaliatory conduct by the appellees following the filing of appellant's claim for racial discrimination with the EEOC.

For the foregoing reasons, the judgment of the district court is reversed and this cause is remanded to the district court for a jury trial not inconsistent with this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1100

On Petition for Rehearing
En Banc.

Chester W. Setser,
Appellant,

v.

Novack Investment Company,
f/k/a Western Trucking
Company and Alvin S. Novack,
Appellees.

Submitted: May 19, 1981

Filed: July 21, 1981

Before LAY Chief judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY, and ARNOLD, Circuit Judges, EN BANC.*

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* Although Judge McMillian did not sit during oral argument, he has participated on the basis of the briefs and approves the opinion.

LAY, Chief Judge.

We rehear a portion of this case en banc in order to reconsider important questions regarding the permissibility under 42 U.S.C. § 1981 of race-conscious affirmative action plans designed to remedy racial imbalance in a private employer's work force. The en banc court did not review the panel's opinion of January 26, 1981, in respect to parts I and III, *Setser* v. *Novack Investment Co.*, 638 F.2d 1137, 1139-43, 1146-47 (8th Cir. 1981). Part II, *id.* at 1143-46, of the original opinion is ordered vacated and the judgment amended to reflect our en banc holding.

On rehearing we address the following issues: (1) whether section 1981 prohibits all race-conscious affirmative action; (2) whether the standards for reviewing affirmative action under title VII govern the review of such plans under section 1981; (3) what are the plaintiff's and defendant's burdens of persuasion and producing evidence in a case where the employer asserts the treatment of plaintiff was pursuant to an affirmative action plan.

The Legality of Affirmative Action Programs Under Section 1981.

In *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Supreme Court held that section 1981 prohibits discrimination against whites, but did not reach the issue of wheter the section prohibited all affirmative action. *Id.* at 281 n.8. Read broadly, *McDonald* may suggest that all preferential treatment on the basis of race is impermissible.[1] Such a broad reading, however, would be unwarranted in view of subsequent

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[1]The Court stated that the statute "proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race." 427 U.S. at 295. *See also United Steelworkers* v. *Weber*, 443 U.S. 193, 219, 220 (1979) (Rehnquist, J., dissenting).

decisions, where seven members of the present Court have sustained affirmative action in other circumstances.[2]

Underlying the Civil rights legislation of the 1860s and 1960s is the judgment that a just and harmonious society requires the eradication of racial discrimination. The progress in eliminating racial barriers in employment has been slow. The eloquent separate opinion of Justice Marshall in *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978), chronicles our Nation's record of discrimination. *Id.* at 387-96. Many obstacles to achieving equal employment opportunities remain, as do many traditionally segregated job categories. The Nation's early perception in the school segregation cases taught us these obstacles are unlikely to be overcome merely by the prohibition of present and future discrimination.[3] As Justice Blackmun observed in *Bakke,*

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[2] *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980) (opinion of Burger, C.J., White and Powell, JJ.; opinion of Powell, J., concurring; opinion of Marshall, Brennan, and Blackmun, JJ., concurring); *United Steelworkers* v. *Weber,* 443 U.S. 193 (1979) (opinion of Brennan, STewart, White, Marshall, and Blackmun, JJ.,); *University of California Regents* v. *Bakke,* 438 U.S. 265 (1980) (opinion of Powell, J., opinion of Brennan, White, Marshall, and Blackmun, JJ.,). Justice Rehnquist did not approve affirmative action remedies in any of these three cases; Justices Stevens and Powell did not participate in *Weber.* Justice Stevens dissented in *Fullilove.*

[3] In 1977 the United States Commission on Civil rights observed:

> The short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity. Many thousands of people have been afforded opportunities to develop their talents fully—opportunities that would not have been available without affirmative action. The emerging cadre of able minority and women lawyers, doctors, construction workers, and office managers is testimony to the fact that when opportunities are provided they will be used to the fullest.

"In order to get beyond racism, we must first take account of race. There is no other way." *Id.* at 407. *See also Fullilove* v. *Klutznick,* 448 U.S. 448, 522 (1980) (Marshall, J., concurring). With regard to title VII, Justice Brennan stated in *United Steelworkers* v. *Weber,* 443 U.S. 193 (1979):

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204.

It would indeed be more ironic if the Civil Rights Act of 1866 was used now to prohibit the only effective remedy for past discriminatory employment practices against blacks and other minorities, when the Act was virtually useless to prevent the oc-

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> While the effort often poses hard choices, courts and public agencies have shown themselves to be sensitive to the need to protect the legitimate interests and expectations of white workers and students and the interests of employers and universities in preserving systems based on merit. While all problems have not been resolved, the means are at hand to create employment and education systems that are fair to all people.
>
> It would be a tragedy if this nation repeated the error that was made a century ago. If we do not lose our nerve and commitment and if we call upon the reservoir of good will that exists in this nation, affirmative action programs will help us to reach the day when our society is truly colorblind and nonsexist because all people will have an equal opportunity to develop their full potential and to share in the effort and the rewards that such development brings.

United States Comm. on Civil Rights, Statement on Affirmative Action, 12 (1977).

currence of such discrimination for more than a century. On this basis, several other federal courts have upheld affirmative action plans against section 1981 challenges since *Weber*. *Local 35* v. *City of Hartford*, 625 F.2d 416, 425 (2d Cir. 1980); *United States* v. *City of Miami, Florida*, 614 F.2d 1322, 1326, *rehearing granted*, 625 F.2d 1310 (5th Cir. 1980); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 691-92 (6th Cir. 1979), *pet. for cert. filed*, 48 U.S.L.W. 3466 (Jan. 10, 1980) (No. 79-1080); *Baker* v. *City of Detroit*, 483 F. Supp. 930, 980 (E.D. Mich. 1979). We conclude that the Supreme Court, by approving race-conscious affirmative action by employers in *Weber*, implicitly approved the use of race-conscious plans to remedy past discrimination under section 1981. To open the door for such plans under title VII and close it under section 1981 would make little sense. The prohibition under section 1981 of affirmative action plans permissible under title VII would bar a remedy Congress left within the discretion of private employers when it passed title VII. *Weber*, 443 U.S. at 207. Such a result "would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals." *Id.*

The Supreme Court recognized in *Weber* that defining the standard for determining permissible racially preferential action by private employers is a more difficult task.[4] We are mindful that "[i]n fashioning a substantive body of law under section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created

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[4] Whether constitutional standards for affirmative action differ from title VII standards is a question we need not reach in this case. *Compare Fullilove*, 448 U.S. 448, *and Bakke*, 438 U.S. 265, *with Weber*, 443 U.S. 193. Under both the Constitution and title VII, two questions are of central importance: (1) when is it permissible to initiate an affirmative action plan, and (2) what methods may be employed to prefer one race over another.

under title VII for direction."[3] This directive is all the more important for determining standards for affirmative action. Divergent standards under the two statutes would render employers unable to remedy some past discriminatory practices, even though the practices were in violation of title VII. Consequently, some effects of employment segregation would be "locked-in." *Id.* at 215 (Blackmun, J., concurring). Moreover, by equating the affirmative action standards of title VII with those of section 1981, we obviate the employer's risk of inconsistent obligations. Private employers already face a dilemma: they risk termination of federal benefits and liability for past discrimination against blacks, for failing to institute an affirmative action plan, and they face liability to whites for any voluntary preferences adopted to remedy past discrimination. If section 1981 prohibited what title VII permitted with respect to racially preferential remedies, the private employer's ability to conform its conduct to federal discrimination statutes would become more complicated and uncertain than it already is.

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[3] *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), *remand aff'd in part, rev'd in part* 586 F.2d 300 (4th Cir. 1978), *later appeal*, 634 F.2d 744 (4th Cir. 1980), *pet. for cert. filed* 49 U.S.L.W. 3533 (Jan. 16, 1981) (No. 80-1199), *quoting Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

For the most part, title VII and section 1981 have similar requirements and remedies. *Markey* v. *Tenneco Oil Co.*, 635 F.2d 497, 498 n.1 (5th Cir. 1981); *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980). Section 1981 affords no greater substantive protection than title VII against employment discrimination, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979), and in some respects may afford less. *Compare Guardians Ass'n* v. *Civil Serv.*, 633 F.2d 232, 263-68 (2d Cir. 1980) *with Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979), with regard to the question of whether a showing of disproportionate impact is sufficient to make a prima facie case under section 1981. Bona fide seniority systems appear to receive the same substantive protection under both title VII and section 1981, but the question

Prima Facie Case of Reverse Discrimination.

The proof required to establish a prima facie case of discrimination will necessarily vary in different factual situations. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 n.13 (1973); *Person* v. *J. S. Alberici Construction Co.,* 640 F.2d 916, 918 (8th Cir. 1981). "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than no based on the consideraton of impermissible factors." *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577 (1978). *Weber* holds, however, that consideration of race is a permissible factor when that consideration is designed to remedy a "conspicuous racial imbalance in traditionally segregated job cateogries." 443 U.S. at 209. Consequently, in a reverse

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may be open to some doubt. *Compare Pettway* v. *American Cast Iron Pipe Co.,* 576 F.2d 1157, 1191 n. 37 (5th Cir. 1978). *cert. denied,* 439 U.S. 1115 (1979); *Johnson* v. *Ryder Truck Lines, Inc.,* 575 F.2d 471 (4th Cir. 1978), *cert. denied,* 440 U.S. 979 (1979) *with Bolden* v. *Pennsylvania State Police,* 578 F.2d 912, 920-21 (3d Cir. 1978).

In *Person* v. *J. S. Alberici Constr. Co.,* 640 F.2d 916 (8th Cir. 1981), a panel of this court recognized that "the principles on the order and allocation of proof [under title VII] . . . are applicable to an action brought under 42 U.S.C. § 1981." *Id.* at 918. *Accord Hudson* v. *International Business Machines Corp.,* 620 F.2d 351, 354 (2d Cir.), *cert. denied,* 101 S.Ct. 794 (1980); *Flowers* v. *Crouch-Walker Corp.,* 552 F.2d 1277 (7th Cir. 1977); *Sabol* v. *Snyder,* 524 F.2d 1009 (10th Cir. 1975); *Long* v. *Ford Motor Co.,* 496 F.2d 500 (6th Cir. 1974).

For similar remedies under the two statutes *see McCormick* v. *Attala County Bd. of Ed.,* 541 F.2d 1094, 1095 (5th Cir. 1976); *see generally Johnson* v. *Railway Express Agy., Inc.,* 421 U.S. 454, 459-61 (1975); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 & n.7 (1974).

The statutes are not identical, however. For example, on the question of the right to a jury when a party seeks back pay under section 1981, the panel's decision in this case distinguishes the practice under title VII. 638 F.2d at 1141-42; *Contra Moore* v. *Sun Oil Co.,* 636 F.2d 154, 156-57 (6th Cir. 1980).

discrimination case, where the evidence shows that plaintiff's treatment by the employer was pursuant to a bona fide affirmative action plan, the satisfaction of the four part *McDonnell* test will not necessarily show a prima facie violation. This must follow because a race-conscious choice by reason of a remedial affirmative action plan is legitimate under title VII or section 1981.

The first burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial. Some indication that the employer has identified a racial imbalance in its work force is necessary to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action. There is no fixed formula for the type or nature of the evidence sufficient to meet the employer's burden. A showing of a conspicuous racial imbalance by statistics is sufficient, even if the statistics employed would not be sufficient to show a prima facie violation of title VII.[6] Evidence that the employer implemented its plan in response to findings of a racially imbalanced work force by a federal or state agency or in adherence to a court order, whether entered by consent or after contested litigation, would be sufficient to meet the employer's burden of producing some evidence of a remedial purpose. The employer's internal investigation and analysis of its work force which results in a conclusion of a racially imbalanced work force would satisfy the employer's burden. This list of ways to meet the employer's burden of producing some evidence of a remedial purpose is merely suggestive, not exhaustive, of appropriate methods.

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[6] "[T]he freedom of an employer to undertake race-conscious affirmative action efforts [does not] depend[] on whether or not his effort is motivated by fear of liability under Title VII." 443 U.S. at 208 n.8.

The second burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action plan is reasonably related to the plan's remedial purpose. The goals and timetables for the program should be reasonably related to such considerations as the racial imbalance of the work force, the availability of qualified applicants, and the number of employment opportunities available.[7] *Weber* tells us that a plan must "not unnecessarily trammel the interests of the white employees." 443 U.S. at 208. The specifics of the plan approved in *Weber* indicate some guidelines for private affirmative action plans.

The *Weber* plan did "not result in the discharge of white workers and their replacement with new black hires." *Id.* at 208. Other courts have also recognized this characteristic as an

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[7] As the EEOC Guidelines set forth:

> (i) The plan should be tailored to solve the problems which were identified in the self analysis, see § 1608.4(a), *supra*, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisoins of the plan or program should be maintained only so long as is necessary to achieve these objectives.
>
> (ii) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

29 C.F.R. § 1608.4(c)(2)(i) and (ii).

> However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

Id. at § 1608.4(d)(2).

indicia of a permissible plan. *Local 35* v. *City of Hartford,* 625 F.2d 416, 425 (2d Cir. 1980); *United States* v. *City of Miami, Fla.,* 614 F.2d 1322, 1339 (5th Cir. 1980); *United States* v. *City of Alexandria,* 614 F.2d 1358, 1366 (5th Cir. 1980); *McLaughlin* v. *Great Lakes Dredge & Dock Co.,* 495 F. Supp. 857 (N.D. Ohio 1980); *Baker* v. *City of Detroit,* 483 F. Supp. 930, 983-86 (E.D. Mich. 1979); *Tangren* v. *Wackenhut Services, Inc.,* 480 F. Supp. 539 (D. Nev. 1979).

Also, the *Weber* plan did not create "an absolute bar to the advancement of white employees." 443 U.S. at 208. In *Weber,* the plan reserved "for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craftworkers in the plant [was] commensurate with the percentage of blacks in the local labor force." *Id* at 197. Finally, the *Weber* plan was characterized as a temporary measure. *Id.* at 208. A plan should be used no longer than reasonably necessary to eliminate a conspicuous racial imbalance.

Once an employer has produced evidence that its treatment of the plaintiff was a direct consequence of its implementation of a bona fide affirmative action plan, the employer is entitled to a judgment as a matter of law unless the plaintiff shows that the purpose of the employer's affirmative action program is not remedial. *Texas Department of Community Affairs* v. *Burdine,* 101 S.Ct. 1089, 1094-95 (1981). To raise a genuine issue of material fact, and avoid summary judgment, a plaintiff in a reverse discrimination case must present evidence that would show that (1) some reason other than a remedial reason motivated the employer when implementing the plan or (2) the plan adopted unreasonably exceeds its remedial purpose. One method of raising an issue as to whether the employer's purpose was remedial would be to show that the plan was adopted in the absence of a racial imbalance in the employer's work force. In the absence of evidence which would show that the employer's interest was not remedial or that the plan's goals are

unreasonably excessive in light of the plan's remedial purpose, summary judgment is warranted.[8]

If the plaintiff presents evidence that the affirmative action plan is unreasonable or irremedial, the court shall weigh the evidence and determine whether the plan is bona fide. The issue of the validity of an affirmative action plan is one for the court and not the jury. There is no bright line distinction between permissible and impermissible affirmative action plans. A flexible evaluation of the particular method adopted is appropriate. Private employers face loss of substantial federal contracts and liability to minorities, if they refuse to initiate affirmative action as a remedy for past discrimination, and they face liability to whites for any voluntary preferences accorded minorities. In light of their dilemma, and out of respect for traditional management prerogatives, 443 U.S. at 207, we are reluctant to discourage experimentation by employers in remedying past discrimination. *Fullilove,* 448 U.S. at 491. An employer's plan is a bona fide one if it is reasonably related to its remedial purpose. *Fullilove,* 448 U.S. at 487, 510; *Local 35,* 625 F.2d at 423-25; *Miami,* 614 F.2d at 1338-40; *Detroit Police Officers',* 608 F.2d at 696.

If the court finds the plan has a remedial purpose and reasonable goals, the employer is entitled to summary judgment, unless there is genuine issue as to whether the treatment of the plaintiff was related to the plan. For example, Setser claims that Novack Investment Co. rejected him on two separate occasions for employment, once in October 1973 and again in November 1973. Setser admits that Novack rejected

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[8] Our decision is not inconsistent with *Parker* v. *Baltimore & O. R.R.,* 25 F.E.P. Cases 889 (D.C. Cir. 1981), wherein the trial court awarded an employer summary judgment on grounds that the employer was implementing an affirmative action program. The Court of Appeals reversed because the affirmative action documents were not part of the record and could not have explained all the employer's promotional decisions in any case. *Id.* at 892.

him in October 1973 because of its affirmative action plan. On remand, if the court finds the plan to be bona fide, Novack is entitled to judgment on the October claim.[9] If the court finds the plan is not bona fide, Novack is still entitled to present any other defense it might have to the jury, including its allegation that Setser was rejected in October as an unreliable employee. The jury shall determine the reason for Setser's rejection. If the jury finds that Setser was rejected in October because of a legitimate, nondiscriminatory reason, Novack is entitled to judgment, regardless whether its plan is bona fide or not.

With respect to Setser's claim that he was rejected in November 1973 (1) because of Novack's affirmative action plan or (2) in retaliation for filing an EEOC claim, the roles of the court and the jury follow the same pattern. The court will determine whether the affirmative action plan is bona fide or not. The jury shall determine whether the reason for rejecting Setser was (1) the plan, (2) retaliation, or (3) some legitimate, non-discriminatory reason. If the court rules the plan is bona fide, Setser is entitled to judgment only if the jury finds that Novack retaliated against him. If the court rules the plan is not bona fide, Novack is entitled to judgment only if the jury finds that some legitimate, non-discriminatory reason explains Setser's rejection.

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[9] Once the court finds the plan to be bona fide under a reverse discrimination claim filed under section 1981 there is nothing further for the jury to pass on. Plaintiff cannot make a claim that his rejection under an affirmative action plan is pretextual since any other alleged reason for his rejection would not be based upon a race-conscious choice and therefore would defeat his claim of racial discrimination under section 1981. Sex and age discrimination claims are not actionable under section 1981. In contrast, under a title VII claim if the plaintiff claims discrimination because of age or sex and the employer asserts as a defense the implementation of an affirmative action plan the issue of a pretextual reason would present an issue of fact for the trier of fact (the court). *Cf. Hunter* v. *St. Louis-San Francisco Ry.*, 639 F.2d 424 (8th Cir. 1981).

We remand this case to the district court for consideration of the employer's affirmative action plan in accordance with this opinion.

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Opposition

81-795
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

J. S. ALBERICI CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

CLYDE L. SISCO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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CITATIONS TO OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals challenged by Petitioner J.S. Alberici Construction Company, Inc. is reported *Sisco* v. *J.S. Alberici Construction Company, Inc.*, 655 F.2d 146 (8th Cir. 1981). Alberici's petition contains numerous references to the decision in *Setser* v. *Novak Investment Company*, 638 F.2d 1137 (8th Cir. 1981) (a/k/a Setser I) and 657 F.2d 962 (8th Cir. 1981) (**en banc**) (a/k/a Setser II) wherein, subsequent to the submission of Petitioner Alberici's Petition herein, this Court denied the employer's Petition for a Writ of Certiorari. *Novack Investment Co.* v. *Setser*, ____ U.S. ____ (No. 81-646, Decided November 16, 1981), 50 U.S.L.W. 3401.

STATEMENT OF THE CASE

J.S. Alberici Construction Company, Inc. is a federal contractor doing business in St. Louis, Missouri and throughout the country. Alberici maintained several job sites in St. Louis, Missouri including the so-called Post Office Project where Clyde L. Sisco was employed in the fall of 1974. The Post Office Project was subject to the so-called "St. Louis Plan," the provisions of which are set out in 41 C.F.R. 60-70 (1974).

Mr. Sisco was a 52 year old white person who had been employed steadily by J.S. Alberici Construction Company as a journeyman ironworker during the eight year period preceding the events of November-December, 1974. Mr. Sisco had been appointed by his union to serve as the ironworkers' on-site steward at the Post Office Project. As the steward, he was protected from layoffs, except that he was to be the "last man" laid off. In November 1974 Alberici's agents told Mr. Sisco that the ironworker workforce was to be reduced and he was to be transferred to some unidentified work site in order that Alberici might employ a minority ironworker to complete the Post Office Project.

Mr. Sisco resisted the transfer, citing racial discrimination and the provisions of the applicable collective bargaining agreement purporting to protect "stewards" from layoffs. Nevertheless, he was separated from the job site and transferred to a short-lived alternate site and Alberici later resumed work on the Post Office Project, assigning a young black *apprentice* ironworker to the Post Office Project.[1] One week after Alberici transferred Mr. Sisco to an alternate work site, Mr. Sisco was separated permanently from Alberici's workforce.

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[1] Circuit Judge Arnold speaking for the Eighth Circuit erroneously observed that "Sisco was not replaced by a new black worker. A qualified black employee with more seniority on the job site was simply retained in preference to Sisco and another white man. For these reasons we hold that Alberici's initial decision to remove Sisco from the Post Office job was not unlawful." *Sisco* v. *Alberici, supra,* 655 F.2d at 149.

Mr. Sisco filed a timely charge with the Equal Employment Opportunity Commission (EEOC) alleging substantive racial discrimination and retaliation. In due course, EEOC determined that there existed reasonable cause to believe that Alberici had discriminated against Mr. Sisco because of his race and had retaliated against him because he opposed conduct unlawful under 42 U.S.C. §2000e.

Mr. Sisco filed a timely judicial action alleging racial discrimination and retailiation under 42 U.S.C. §1981 and §2000e. In his action under §1981, he sought monetary damages including lost wages, cost of securing and maintaining alternative employment, pain and suffering, humiliation, loss of security, experience and training, punitive damages, interest, as well as attorneys fees and costs under 42 U.S.C §1988. He filed a separate count with respect to 42 U.S.C. §2000e (Title VII) wherein he sought reinstatement and to be made whole for his financial losses, attorneys fees and costs.

Mr. Sisco made a timely request for a jury trial on his claims under 42 U.S.C. 1981. Petitioner Alberici did not challenge Respondent Sisco's right to a jury trial in any respect. The district court *sua sponte* denied plaintiff Sisco's request for a jury trial.

At Alberici's request, and over Mr. Sisco's objections, the district court consolidated Mr. Sisco's claims with those of another plaintiff who also accused Alberici of racial discrimination. A three-day bench trial was held in August 1978. On April 24, 1980 the court issued findings of fact and conclusions of law and a jugment dismissing Mr. Sisco's claims.

Mr. Sisco appealed to the Court of Appeals for the Eighth Circuit. That Court affirmed the dismissal of his claim of substantive racial discrimination under §1981, holding that Alberici's reliance on its affirmative action plan in transferring Sisco from the Post Office Project site was lawful. *Sisco* v. *J.S. Alberici Contruction Company, Inc., supra,* 655 F.2d at 149.

The Court also held that Mr. Sisco was entitled to a jury trial on his claim under §1981 that the company's conduct toward him after he resisted the transfer from the Post Office Project constituted retaliation against him for his responsible protest of what he believed was racial discrimination. *Ibid., supra,* 555 F.2d at 150-151.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that 42 U.S.C. 1981 is independent of 42 U.S.C. 2000e-3(a) and permits a cause of action for retaliation against one, acting in good faith, who pursues a claim of racial discrimination. The Court's holding that the Seventh Amendment requires a jury trial of legal claims in an action under 42 U.S.C. 1981 was compelled by prior decisions of this Court. Both holdings are in accordance with propositions settled by this Court and do not conflict with applicable decisions by other Courts of Appeals in a manner sufficient to warrant review by the Court at this time.

ARGUMENT

A. The Court Of Appeals Correctly Held That 42 U.S.C. §1981 Provides A Cause Of Action For Retaliation In A Racial Context

The Eighth Circuit Court of Appeals in the instant case, relying on its earlier panel decision in *Setser* v. *Novack Investment Co.*, 638 F.2d 1137 (8th Cir. 1981) (Setser I), properly held that 42 U.S.C. §1981 is independent of Title VII's prohibition against retaliation (42 U.S.C. 2000e-3(a)) and allows a cause of action for retaliation against one who protests what he reasonably believes to be racial discrimination.

Petitioner mistakenly relies on *Hudson* v. *International Business Machines Corp., et al.*, 620 F.2d 351 (2nd Cir.), *cert. den'd.*, 101 S.Ct. 794 (1980) to generate a supposed conflict between the instant decision of the Court of Appeals and the Court of Appeals for the Second Circuit. In fact, no such conflict exists. In *Hudson, supra,* the Second Circuit upheld the district court's dismissal of a retaliation claim under §1981. The Court's affirmance, however, was bottomed on the plaintiff's failure in the district court to establish any acts of retaliation. *Hudson* v. *International Business Machines Corp., et al., supra,* 620 F.2d at 356. The Second Circuit specifically declined to consider the soundness of the district court's analysis and legal conclusions with respect to the availability of a claim for retaliation under 42 U.S.C. §1981. *Id.*

The Second Circuit's refusal in Hudson to address the issue whether §1981 provides a cause of action for retaliation undermines the significance, if any, of Petitioner's observation that this Court denied the employee's petition for a writ of certiorari in that case. In any event, this Court very recently denied an employer's petition for a writ of certiorari which presented the issue whether the Eighth Circuit Court of Appeals erred in construing §1981 to permit a cause of action for retaliation against

persons who protest racial discrimination by filing a charge with the Equal Employment Opportunity Commission. *Novak Investment Co.* v. *Setser,* ____ U.S. ____ (No. 81-646, Decided November 16, 1981), 50 U.S.L.W. 3401. Justice White, writing for two other members of the Court and dissenting from the Court's denial of certiorari with respect to the §1981 jury trial issue, nevertheless expressed his agreement with the Court's denial of certiorari with respect to the retaliation issue, observing:

> Respondent also alleged that he was refused employment by petitioners in retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission. Petitioners seek review of the Court of Appeals holding that §1981 affords a cause of action based on alleged retaliation for such a filing. I do not believe that this issue merits consideration by the Court at this time. *Id.* 50 U.S.L.W. at 3401, n. 1.

Petitioner in this case also objects to the Eighth Circuit's "failure" to define standards for a cause of action for retaliation under §1981. The narrow question presented to and addressed by the Court of Appeals in the instant case was whether Respondent had "a cognizible claim for retaliation under . . . 42 U.S.C. §1981." *Sisco* v. *J.S. Alberici Construction Company, Inc.,* 655 F.2d 146, 148 (8th Cir. 1981). The Eighth Circuit's decision in *Setser I,* relied upon by the Court below, cited ample authority in support of an affirmative answer to this question. In the absence of any conflict betweem the Circuits, not identified by Petitioner, this Court should not now reach out to decide the broader question of the precise parameters of such a claim without further case law development both in the Eighth Circuit and elsewhere.

Petitioner cites language from *Emporium Capwell Co.* v. *Western Addition Community Org.,* 420 U.S. 50, 72 n. 25

(1975) in which this Court reserved the question whether Title VII's retaliation provision (§704(a)) extends beyond the "right of access" to the EEOC and federal courts. Numerous decisions, cited in *Setser I,* support the proposition that §1981 does extend beyond the mere "right of access" to embrace informal protests of racial discrimination by employees or applicants. *See, e.g., Winston* v. *Lear-Siegler, Inc.,* 558 F.2d 1266 (6th Cir. 1977); *Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center,* 80 F.R.D. 254 (N.D. Ill. 1978); *Cubas* v. *Rapid Am. Corp. Inc.,* 420 F.Supp. 663 (E.D. Pa. 1976). Indeed, in *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969), this Court permitted a suit under 42 U.S.C. §1982 by a white property owner who was expelled from a residential community organization because he assigned his interest in real property to a black person.

B. The Court Of Appeals Correctly Held That Respondent Is Entitled To A Jury Trial In His Action For Retaliation Under 42 U.S.C. §1981.

In deciding this issue, the Court of Appeals relied on its prior decision in *Setser I, supra,* which held that a party in a §1981 action was entitled to a jury trial on all his legal claims, including his claim for lost wages. *Setser* v. *Novak Investment Co.,* 638 F.2d 1137, 1142 (8th Cir. 1981).

It is settled law that a jury trial is available in those instances where the three considerations set out in *Ross* v. *Bernhard,* 396 U.S. 531 (1970) coalesce:

> First, the premerger custom with reference to such question; second, the remedy sought; and third, the practical abilities and limitations of jurys. *Id.,* 396 U.S. at 538.

The initial test of *Ross* v. *Bernhard, supra,* is satisfied herein notwithstanding §1981's enactment date. *Curtis* v. *Loether,* 415 U.S. 189 (1974). The second test is satisfied because §1981 permits recovery of legal damages, including compensatory and

punitive damages, which are sought herein. *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 460 (1974). Satisfaction of the third test set out in *Ross* v. *Bernhard, supra,* cannot reasonably be contested in light of this Court's determination in *Lorillard* v. *Pons,* 434 U.S. 545 (1978) (jury trials available in cases of age discrimination) and *Curtis* v. *Loether, supra* (jury trials available in cases of housing discrimination). The Court of Appeals in *Setser I,* and, by derivation, the Court below properly relied on these established authorities in finding a right to a jury trial for all legal claims in a §1981 action. *Accord, Moore* v. *Sun Oil Company of Pennsylvania,* 636 F.2d 154 (6th Cir. 1980).

Petitioner cites this Court to the two paragraph, *per curiam* decision of the Fifth Circuit in *Lynch* v. *Pan American World Airways,* 475 F.2d 764 (5th Cir. 1973), asserting that *Lynch* "directly conflicts" with *Setser I.* However, the two decisions are clearly distinguishable.

The situation in *Lynch* v. *Pan American World Airways, supra,* is factually different from that presented by Respondent Sisco. Mr. Sisco, like Mr. Setser in *Setser I,* did not seek reinstatement in his §1981 action. In contrast, the plaintiff in *Lynch* v. *Pan American World Airways, supra,* sought back pay with reinstatement and his allegations for compensatory and punitive damages were "unsupported." *Id.* 475 F.2d at 765. Thus, the rule articulated in *Lynch* v. *Pan American World Airways, supra,* is not at odds with that expressed in the instant decision by the Eighth Circuit Court of Appeals. Even within the former Fifth Circuit, the decision in *Lynch* v. *Pan American World Airways, supra,* has not been a bar to jury trials where plaintiffs seeking lost wages and other actual damages, but no injunctive relief or reinstatement, have initiated actions under 42 U.S.C. 1981. *Johnson* v. *Sea Drilling Corporation,* 486 F.Supp. 462 (E.D. La. 1980); *Page* v. *Schlumberger Wells,* ____ F.Supp. ____, (D.S.D. Tx., June 6, 1980) [23 E.P.D. ¶ 31, 104].

Neither does the Sixth Circuit Court of Appeal's decision in *Moore* v. *Sun Oil Company of Pennsylvania,* 636 F.2d 154 (6th Cir. 1980) present a conflict of sufficient importance with the instant decision to warrant review by this Court at this time. In *Moore,* the Court concluded that the Constitution requires a jury trial where a party seeks legal relief (i.e. compensatory or punitive damages) in an action under 42 U.S.C. 1981, but that a claim for "back pay" is equitable in nature and does not trigger the same right. *Id.* 636 F.2d at 156-157. The Court held that since Moore's claims for legal and equitable relief were both based on alleged racial discrimination and since Moore was entitled to a jury trial with respect to his legal claims, he was entitled to have a jury determine liability, although the district court would determine his entitlement to backpay. *Id.* 636 F.2d at 157. As Justice Stevens observed in writing in support of this Court's denial of certiorari with respect to the §1981 jury trial issue in *Setser I,* both the Eighth and Sixth Circuits agree that the issue of liability should be decided by a jury, and "[t]he question whether the arithmetical calculation of back pay should be made by a judge or by a jury under instructions from the judge is not nearly as significant as the question whether the determination of liability should be made by a judge or a jury." *Novak Investment Co.* v. *Setser,* ____ U.S. ____ (No. 81-646, Decided November 16, 1981), 50 U.S.L.W. 3401.

Petitioner also complains of a "dichotomy" resulting from the Court's decision below in that plaintiff may choose or not choose a jury trial depending on whether he sues under §1981 or Title VII. However, the "dichotomy" arises, not from any misapprehension of the applicable law by the Court below, but the fact that whereas Congress apparently intended only court granted relief in Title VII, *see Lorillard* v. *Pons,* 434 U.S. 575, 584-585, and *Lehman* v. *Nakshian,* ____ U.S. ____, 69 L.Ed.2d 548 (1981), no such limitation is apparent under §1981. *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 459-60 (1975).

C. The Court Of Appeals Correctly Held That 42 U.S.C. §1981 Prohibits Retaliation Against An Employee Who Reasonably And In Good Faith Protests, As Racially Discriminatory, An Employer's Affirmative Action Plan Subsequently Determined To Be Lawful.

The Court of Appeals below properly relied on *Berg* v. *La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980), *Sias* v. *City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978) and *Hearth* v. *Metropolitan Transit Commission*, 436 F.Supp 685 (D. Minn. 1977) in holding that §1981 permits a cause of action for retaliation against an employee who protests what he reasonably believes is, but may not turn out in fact to be, racial discrimination. *See also, McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 796 (1973). (§704(a) of Title VII "forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment").

The *Berg, Sias* and *Hearth* decisions all rest on the sound realization that the statutory purpose of eliminating discrimination in employment would be undermined by a rule permitting an employer to retaliate with impunity against an employee who reasonably - albeit in retrospect mistakenly - protests alleged employer discrimination. Such a rule would chill the legitimate assertion of charges of discrimination and discourage employees from frankly calling "to their employers' attention discriminatory policies of which the employer may be unaware or which might result in protracted litigation to determine their legality if they were not voluntarily changed." *Berg* v. *La Crosse Cooler Co., supra*, 612 F.2d at 1045; *see also Sias* v. *City Demonstration Agency, supra*, 588 F.2d at 695; *Hearth* v. *Metropolitan Transit Commission, supra*, 436 F.Supp. at 688-689.

Petitioner attempts to distinguish the *Berg* and *Sias* Circuit Court decisions on the basis that in both cases "the employee

voiced opposition on behalf of a fellow employee with regard to conduct by the employer which was illegal discrimination." Petitioner does not explain why an employee's opposition to discrimination directed against himself rather than others should warrant different legal treatment; in any event, the employee in *Sias* complained of discrimination with respect to himself as well as other Mexican-Americans. *Sias* v. *City Demonstration Agency,* 588 F.2d at 695. Moreover, the *Berg* Court noted that the employment practice in that case was *lawful* at the time the employee opposed it, although it was subsequently made unlawful by federal legislation. *Berg* v. *La Crosse Cooler Co., supra,* 612 F.2d at 1043-1045. In *Sias,* the Court specifically declined to find that the opposed employment practices were in fact discriminatory, observing that the record "supports the inferential finding that Sias acted upon the reasonable belief that these practices existed." *Sias* v. *City Demonstration Agency, supra,* 588 F.2d at 696, n. 5.

Petitioner distinguishes *Hearth* on the additional basis that there, unlike here, the employee acted on a "good faith" belief in opposing perceived discriminatory conduct by the employer. Whether or not Respondent Sisco in "good faith" opposed Petitioner's conduct is a question of fact for the jury on remand to the district court to decide. It suffices to note here that, as the Court's opinion below illustrates, Respondent opposed the employer's affirmative action plan in an appropriate and non-disruptive manner at a time (1974) when the case law concerning the legal validity of such a plan was largely undeveloped. *Sisco* v. *J.S. Alberici Construction Co., Inc., supra,* 655 F.2d at 150.

Petitioner also asserts, with typical hyperbole, that the Court of Appeals decision below, if unreviewed, will sound the "death knell" for affirmative action plans sanctioned by this Court in *United Steel Workers* v. *Weber,* 443 U.S. 193 (1979). The suggestion that an employer's voluntary affirmative action plan will crumble in the face of reasonable protests by its employees

ignores the significant positive effects of a frank and uninhibited exchange of ideas between employees and employer with respect to the many different and difficult questions concerning the validity of such plans. This is true notwithstanding the fact that, perhaps years later, the plan may be declared valid by a reviewing court. An employee must feel free to reasonably oppose such plans without fear of retaliation by his employer. Only the most unimaginative of employers - or those motivated by illegitimate considerations - will seek to preserve the integrity of their affirmative action plans by simply terminating or otherwise retaliating against those employees who in good faith protest the validity of such plans.

D. No Conflict Exists Between The Court Of Appeals Holding That Respondent Is Entitled To A Jury Trial In His Action Under 42 U.S.C. §1981 And This Court's Decision In *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979)

Petitioner contends that the following passage from the opinion of the Court of Appeals below is in direct conflict with *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979):

> . . . Under well-established doctrine, an issue of fact common to a legal and equitable claim must be tried to a jury, lest Seventh Amendment rights be extinguished by collateral estoppel if the equitable claim is tried first to the court. See *Setser I*, 638 F.2d at 1141 and n. 8. *Sisco* v. *J.S. Alberici Const. Co., Inc.*, 655 F.2d 146, 151 (8th Cir. 1981).

The portion of *Setser I* referred to in the above-quoted passage in turn refers to this Court's decision in *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *see also Beacon Theatres Inc.* v. *Westover*, 359 U.S. 500 (1959). Thus, Petitioner in effect posits a conflict between *Parklane Hosiery* and this Court's decisions in *Dairy Queen* and *Beacon Theatres*.

However, no such conflict exists. *Parklane Hosiery* dealt with two separate, independent actions brought against the same defendant. Although this Court held that, under the circumstances of that case, an equitable determination in the first action could have collateral estoppel effect in a second legal action, the Court reaffirmed its prior holdings in *Beacon Theatres* and *Dairy Queen* that "when legal and equitable claims are joined in the *same action,* the trial judge has only limited discretion in determining the sequence of trial and 'that discretion . . . must, wherever possible, be exercised to preserve jury trial.' " *Parklane Hosiery Co.* v. *Shore, supra,* 439 U.S. at 334 (emphasis added) (citations and footnote omitted). Hence, the Court below properly held that the issue whether the employer retaliated against Respondent for his protest against being removed from the Post Office job was an issue of fact common and crucial to the retaliation claims under either §1981 or Title VII, thereby requiring a jury trial on remand to the district court. *Sisco* v. *J.S. Alberici Construction Co., Inc., supra,* 655 F.2d at 151.

Petitioner appears to contend that *Parklane Hosiery* should be applied in the instant case to deny Respondent a jury trial by giving collateral estoppel effect to the judicial determination that the employer's affirmative action plan was valid. But apart from the question whether the validity of such a plan is a proper jury question, a determination that the plan is valid does not, as noted *supra* in this brief, foreclose an employee from stating a retaliation claim under §1981 entitling him to a jury trial.

CONCLUSION

The Court of Appeals correctly held that a jury trial is available to litigants under 42 U.S.C. 1981 and that the same statute provides a remedy to one who is subjected to reprisals for opposing what he believes is racial discrimination. The Petitioner has failed to demonstrate the existence of special and important reasons why the writ should be granted. The instant decision does not present a conflict with applicable decisions of this Court or of another Court of Appeals on the same matter(s) sufficient to warrant review by this Court at this time.

Respectfully submitted,

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